Supreme Court, U.S.
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No. ——

# In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
*Petitioner*,

v.

TIMOTHY P. HEDGECORTH,
*Respondent*.

**On Petition for a Writ of Certiorari to the Missouri Court of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether a defendant in an action brought under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, in which the plaintiff seeks damages for fear of cancer is entitled to an instruction requiring the jury to find that the plaintiff's alleged fear is genuine and serious.

## PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

## RULE 29.6 STATEMENT

Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation and Southern Pacific Rail Corporation. Southern Pacific Rail Corporation is a wholly owned subsidiary of Union Pacific Corporation. Dodge & Cox is the only publicly held company that owns ten percent or more of the stock of Union Pacific Corporation.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Union Pacific Railroad Company ("Union Pacific") respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals.

## OPINIONS BELOW

The opinion of the Missouri Court of Appeals affirming the judgment of the trial court is published at 210 S.W.3d 220 (Mo. Ct. App. 2006) and is reproduced in the Petition Appendix ("Pet. App.") at 5a-19a. The Missouri Court of Appeals' order denying rehearing and/or transfer to the Missouri Supreme Court is reproduced at Pet. App. 3a-4a. The order of the Missouri Supreme Court denying an application for transfer from the Missouri Court of Appeals is reproduced at Pet. App. 1a-2a.

## JURISDICTION

The judgment of the Missouri Court of Appeals was entered on August 22, 2006. Pet. App. 5a. The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court on October 11, 2006. Pet. App. 3a-4a. The Missouri Supreme Court denied transfer on January 30, 2007. Pet. App. 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, are reproduced at Pet. App. 88a-89a. Missouri Approved Jury Instructions ("MAI") 8.02, 24.01, 37.01, and 37.03, as modified and given by the lower court, are reproduced at Pet. App. 79a-80a.

## STATEMENT OF THE CASE

State courts have jurisdiction, under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, over personal injury claims brought by railroad employees against their employer. The state courts must apply the common law "as established and applied in the federal courts" in FELA cases. *Urie v. Thompson*, 337 U.S. 163, 174 (1949).

This Court, in *Norfolk & Western Railway Company v. Ayers*, held that plaintiffs who had developed an asbestos-related disease may recover damages for their alleged fear of cancer, subject to "an important reservation" that the alleged fear is "genuine and serious." 538 U.S. 135, 141, 158 (2003). In response to concerns that there would be jury speculation as to proper compensation for such damages, the Court said that "verdict control devices. . . . [including] on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious" will protect railroad defendants against unlimited and unpredictable liability. *Id.* at 159 n.19.

Union Pacific sought just such a "verdict control device" – a jury instruction that spelled out, in accordance with *Ayers*, exactly what the jury had to find to award damages for fear of cancer. The trial court refused the instruction because it was not found in the Missouri pattern instructions. It subsequently entered a $240,000 judgment against Union Pacific in favor of the respondent, despite the paucity of evidence supporting respondent's fear of developing cancer. This ruling was in direct conflict with this Court's decisions, including its decision prohibiting a state court from rejecting a proffered jury instruction merely because it is not found in state-approved instructions such as the MAI.

Certiorari is warranted because the Missouri court, in a FELA action, resolved a question of substantive law in a way that conflicts with relevant decisions of this Court. Alternatively, the proper resolution of the question presented is so plain, and the conflict with the Court's precedent so egregious, that summary reversal should be considered by the Court.

*A. Statutory Background*

Congress enacted the FELA as a broad remedial statute to provide relief for injured railroad workers who worked in unsafe or hazardous conditions. *Urie v. Thompson*, 337 U.S. at 181. "In order to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 542 (1994). FELA, however, is not a worker's compensation statute. In fact, this Court has "insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty." *Gottshall*, 512 U.S. at 543.

Section 1 of FELA renders "[e]very common carrier by railroad . . . liable in damages to any person suffering injury while . . . employed by [the] carrier" if the "injury or death result[ed] in whole or in part from the carrier's negligence." 45 U.S.C. § 51. Absent express statutory departures, the requisite elements of a FELA cause of action are determined by the common law "as established and applied in the federal courts." *Urie*, 337 U.S. at 174. The scope of FELA "is a federal question not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Id.* Uniformity under FELA is vital in light of the wide latitude FELA plaintiffs have to select a forum in which to bring suit. 45 U.S.C. § 56.

Federal substantive law governs on questions concerning the measure of damages in FELA cases. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335. The well-settled rule is that "the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409, 411 (1985).

*B. Factual Background*

Respondent Timothy Hedgecorth ("Hedgecorth") worked as a Clerk for Union Pacific. Trial Transcript ("Tr.") 172-79, 181. He worked at the railroad's headquarters building located in St. Louis, Missouri until being transferred to Omaha, Nebraska. *Id.* at 173-84.

He never experienced any symptoms of an asbestos-related disease. *Id.* at 700; L.F. 619-21, 626; S.L.F. 31.[1] Nevertheless, he participated in an attorney-sponsored screening for asbestos-related diseases. Tr. 143, 195-96. He was notified that he had asbestosis. *Id.* at 196. His attorney referred him to a pulmonary specialist, Dr. Jill Ohar, for further evaluation. Tr. 196-97, 227-28. He told the specialist and testified at trial that he believed he had been exposed to asbestos while working in the St. Louis office building. Tr. 197; S.L.F. 14. Dr. Ohar told Hedgecorth he had "very mild" asbestosis, and described the health problems, including cancer, that are associated with asbestos exposure. Tr. 198-99; S.L.F. 17, 19-20, 38. He claims her mention of cancer

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[1] "LF" citations are to the "Legal File" and "S.L.F." citations are to the "Supplemental Legal File" submitted to the Missouri Court of Appeals, which contains excerpts of the trial record.

"knocked [him] off his feet" because "cancer is a scary word." Tr. 199.

In 2000 or 2001, Hedgecorth learned that he had a tumor in his back, which was diagnosed as a myxofibrosarcoma. Tr. 200-01. This cancer is not associated with asbestos exposure. *Id.* at 477, 593-94. Hedgecorth underwent three surgeries and radiation for this cancer. *Id.* at 201. He claims he worries about a recurrence of this cancer. *Id.* at 226. Yet, the physician who treated his prior disease testified that he was "stoic" or indifferent when diagnosed and treated for his cancer. Def. Union Pacific Railroad Company's Mem. of Law in Supp. of its Mot. for a New Trial or, in the alternative, Remittitur, Exh. C (Pet. App. 66a-73a).

Hedgecorth provided the only evidence regarding his alleged fear of cancer. He claims he thinks about the possibility that he may develop an asbestos-related cancer. Tr. 204. However, he never sought any type of counseling or psychiatric treatment. *Id.* at 228. Nor did friends or co-workers corroborate his self-described concerns. He offered no evidence that he or one of his physicians believed he should receive psychiatric treatment or psychological counseling. He also did not indicate that his concerns related to his alleged asbestos exposure have caused nightmares or sleepless nights or affected his work life or friendships.

According to Hedgecorth, Dr. Ohar told him that he needed to "keep an eye" on his asbestosis. Tr. 198. Yet, other than his single, litigation-driven visit, he has not seen Dr. Ohar or another pulmonologist for follow-up care. Tr. 228-29. Nor did Hedgecorth say that, because of asbestos exposure, he now sees a general practitioner more often than he did in the past.

Hedgecorth has been a moderate to heavy smoker most of his life and knows that his smoking history puts him at risk of developing cancer. Tr. 226-27. He admitted that he is "worried" about developing a smoking-related disease such as cancer and emphysema. *Id.* Yet, he has continued to smoke cigarettes despite multiple admonitions from his physicians about the serious risks involved. *Id.* at 199-200, 227.

*C. Proceedings Below*

Hedgecorth brought suit under the FELA, alleging that Union Pacific failed to provide "reasonably safe conditions for work," "reasonably safe appliances," and "reasonably safe methods of work." Pet. 3 (L.F. 28). He sought damages for his asbestosis and fear of cancer, as well as lost earning capacity and potential medical expenses. Pet. 5 (L.F. 30). The case was tried by a jury in a Missouri state court and Union Pacific argued that Hedgecorth's fear of cancer was not "genuine and serious." Tr. 800.

Union Pacific asked the court to instruct the jury with respect to the elements of Hedgecorth's fear of cancer claim. Tr. 762-64 (Pet. App. 85a-87a). It argued that the *Ayers* decision required the court to instruct the jury with respect to the elements of Hedgecorth's fear of cancer claim, specifically the requirement that a plaintiff must prove that his alleged fear of cancer is "genuine and serious." *Id.* The trial judge rejected Union Pacific's request.

The instructions the trial court gave failed to provide the jury with any meaningful guidance regarding Hedgecorth's fear of cancer claim. The comparative fault instruction based on MAI 8.02, which governs damages in a FELA case, instructed the jury to "award plaintiff such sum as will fairly

and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in evidence." Pet. App. 80a. This instruction did not describe the "injury" at issue or inform the jury, consistent with *Ayers'* command, that Hedgecorth is only entitled to fear of cancer damages if he proves his fear is "genuine and serious."[2] *Id.* The instruction based on MAI 24.01 also failed to describe the injury at issue or inform the jury of the requirements for recovery of damages for fear of cancer.[3] Pet. App. 79a.

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[2] Instruction No. 9 instructed the jury as follows:

> If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in evidence. You must state such total amount of plaintiff's damages in your verdict.
>
> In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage you assess to plaintiff. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income taxes.

[3] Instruction No. 7 instructed the jury as follows:

In your verdict you must assess a percentage of fault to defendant whether or not plaintiff was partly at fault if you believe:

The jury returned a verdict against Union Pacific in favor of Hedgecorth on April 19, 2005, awarding $240,000.00 in damages. Judgment; Verdict (Pet. App. 74a-78a). The trial court did not rule on Union Pacific's motion for a new trial, effectively denying it. L.F. 24; Mo. Sup. Ct. R. 78.06.

On appeal, Union Pacific challenged the trial court's rejection of Union Pacific's tendered instruction on the issue of fear of cancer. Pet. App. 5a. The Missouri Court of Appeals rejected the challenge and affirmed the judgment of the trial court. It explained that "MAI damage instruction 8.02 was given; [and] any further explanation by instruction was not acceptable procedure under MAI." Pet. App. 17a. It reasoned that *Ayers* did not require "not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer." Pet. App. 18a-19a.

The Missouri Court of Appeals denied Union Pacific's motion for rehearing on October 11, 2006 and simultaneously denied Union Pacific's petition for transfer to the Missouri Supreme Court. Pet. App. 3a-4a. Union Pacific subsequently filed an Application for Transfer with the Missouri Supreme Court. Pet. App. 1a-2a. This is similar to a petition for a writ of certiorari. *See* Mo. Sup. Ct. R. 83.04. The Missouri Supreme Court denied transfer on January 30, 2007. Pet. App. 1a-2a.

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First, defendant failed to provide reasonably safe conditions for work, and

Second, defendant was thereby negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

## REASONS FOR GRANTING THE PETITION

The FELA is not intended to transform railroads into the "insurers of the emotional well-being and mental health of their employees." *Gottshall*, 512 U.S. at 554. The courts, when interpreting the law, "must consider the general impact, on workers as well as employers, of the general liability rules they . . . thereby create." *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424, 438 (1997). In accordance with these principles, the Court, in *Norfolk & Western Railway Company v. Ayers*, was careful to limit recovery for "fear of cancer" damages to those complainants who demonstrate that their fear is "genuine and serious." *Ayers*, 538 U.S. at 158.

To control against frivolous claims and potential jury speculation, *Ayers* said that defendants could seek verdict control devices, such as jury instructions, that specifically require a finding sufficient to support damages for fear of cancer. The Missouri court's strict adherence to procedural rules – jury instructions regarding damages under the FELA which do not reflect *Ayers'* "genuine and serious" requirement – impermissibly denies a defendant its federal substantive rights. The lower court's rejection of Union Pacific's tendered instructions on the issue of fear of cancer is directly contrary to this Court's decision in *Ayers* and those decisions which require jury instructions concerning the measure of damages in a FELA action to reflect federal substantive law. *Id.* at 158-59; *Morgan*, 486 U.S. at 335; *Dickerson*, 470 U.S. at 411. Accordingly, this Court should grant review.

## I. THE MISSOURI COURTS MAY NOT DISREGARD THIS COURT'S REQUIREMENT THAT THE INSTRUCTIONS IN A FELA ACTION MUST REFLECT FEDERAL SUBSTANTIVE LAW

The mandatory jury instructions promulgated by the Missouri courts do not instruct the jury that to recover damages for fear of cancer it must find that the plaintiff's fear is "genuine and serious" as required by *Ayers*. The court below held that the trial court's rejection of Union Pacific's tendered instruction on the issue of fear of cancer was not erroneous because the applicable damages instruction, MAI 8.02, is mandatory. However, failing to instruct the jury as to substantive federal law because it does not fit a pattern jury instruction conflicts with prior decisions of this Court. *Morgan*, 486 U.S. at 335; *Dickerson*, 470 U.S. at 411.

This Court has repeatedly held that the parties in FELA cases are entitled to jury instructions that fully and accurately convey the requirements of the governing federal substantive law. As early as 1916, a mere eight years after the enactment of the FELA, this Court held that a defendant in a FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." *Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 491 (1916).

In 1985 and 1988, the Court reaffirmed its prior holding. In *St. Louis Southwestern Railroad Company v. Dickerson*, the Court held that a Missouri court's refusal to instruct a FELA jury that any future losses awarded to the plaintiff must be reduced to present value, because it was not provided for in the MAI, was at odds with federal law. 470 U.S. at 411-12. The *Dickerson* court noted that "the propriety of jury

instructions concerning the measure of damages in an FELA case is an issue of 'substance' determined by the federal law." *Id.* at 411. Accordingly, a state court may not reject a proffered jury instruction simply because it is not found in state-approved instructions. *Id.*

The Court again reversed the decision of a lower court in *Monessen Southwestern Railway Company v. Morgan*, because the tendered instruction did not reflect that future losses must be reduced to present value. 486 U.S. at 342. This Court did so because federal substantive law governs the measure of damages in a FELA case. *Id.* at 335.

This Court has repeatedly embraced limitations on the damages a FELA plaintiff may recover for emotional distress injuries, in particular, damages for "fear of cancer." It has twice analyzed the circumstances in which recovery is permitted. Both decisions demonstrate the importance of tendering instructions which accurately reflect the limitations imposed by federal substantive law.

In its first opinion on the subject, *Metro-North Commuter R.R. Co. v. Buckley*, the Court refused to permit recovery for fear of cancer where the plaintiff had extensive asbestos exposure, but had not developed asbestosis or any other cognizable physical injury. 521 U.S. at 428-38. The Court explained that fear of cancer is a subcategory of the tort of negligent infliction of emotional distress. Under the common law, recovery for negligently caused emotional distress, which is unaccompanied by physical injury, is the exception rather than the rule. *Id.* at 429-30. Permitting recovery of emotional distress damages for fear of cancer in these circumstances could not be squared with the FELA's common law underpinnings.

This Court identified several policy considerations which counseled against recognizing a right of recovery. First, the difficulties associated with distinguishing between valid or important claims and invalid or trivial claims were examined. The Court noted that, in today's society, exposure to carcinogens is ubiquitous, and everyone faces a substantial risk of developing cancer. *Id.* at 434-35. Although asbestos exposure increases this risk, the increase is not so substantial that it provides reasonable assurances that the plaintiff's professed fears are valid and genuine. *Id.* Plaintiff testified that he feared developing an asbestos-related disease, yet he "sought no professional help to ease his distress, and presented no medical testimony concerning his mental health." *Id.* at 445. He also continued to smoke cigarettes, ignoring his doctors' warnings to quit. *Id.* at 433-34. In addition, the Court noted that a rule permitting recovery in the absence of physical injury could result in unpredictable, yet massive liability which could diminish the likelihood of recovery by persons with real injuries. *Id.* at 435-36.

Against this background, the Court returned to the subject of recovery for fear of cancer in *Norfolk & Western Railway Company v. Ayers*. 538 U.S. 135. Several plaintiffs who developed asbestosis sought recovery for "their fear of developing cancer" as part of their damages. *Id.* at 142. The Court held that plaintiffs who had developed an asbestos-related disease may recover damages for their alleged fear of cancer. *Id.* at 141.

Although the *Ayers* Court held that fear of cancer damages are recoverable when the plaintiff has sustained an injury, it did not dismiss *Metro-North*'s policy concerns. The *Ayers* majority cautioned that the rule permitting recovery of fear of cancer damages is subject to "an important reservation": the

plaintiff must "prove that his alleged fear is genuine and serious."[4] *Id.* at 158.

*Ayers* emphasized that "[v]erdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious" would allow juries to distinguish between valid and invalid claims, and ameliorate any concerns that juries will make arbitrary and unpredictable damages awards, having crippling financial consequences for the defendants. *Id.* at 158 n.17, 159 n.19, 178-81, 184-86. A "fear of cancer claim" unsupported by corroborative objective evidence would be "notably" thin, according to the Court. *Id.* at 158 & n.18.

The lower court turned a blind eye to the substantive law set forth in *Ayers*. Specifically, it ignored the requirement that a claimant's fear must be "genuine and serious" before he or she may recover damages for fear of cancer. *See id.* at 158; Pet. App. 14a-19a. By ignoring this portion of the *Ayers* decision, the lower court effectively stripped Union Pacific of its substantive rights, *i.e.* its right to have the fact-finder evaluate the complainant's fear of cancer in light of this requirement. This is contrary to the Court's mandate in *Metro-North Commuter Railroad Company v. Buckley* that the court must consider the general impact of its action on workers as well as employers. 521 U.S. at 438. It is also contrary to the decisions of other state courts which require

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[4] The *Ayers* court recognized that both federal and state courts embraced this requirement. *Id.* at 157-58 (citing *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 859 (5th Cir. 1988); *Coffman v. Keene Corporation*, 608 A.2d 416, 424-25, 257 N.J.Super. 279, 293-94 (1992)).

a complainant to demonstrate, in accordance with and since *Ayers*, that his or her fear is "genuine and serious." *See Seaford v. Norfolk Southern Railway Company*, 824 N.E.2d 94, 112, 159 Ohio App.3d 374, 398 (2004) *rev'd on other grounds*, 835 N.E.2d 717, 106 Ohio St.3d 430 (2005).

The Missouri courts' reliance on standard jury instructions, the MAI, to convey this requirement is not only insufficient, but it flies in the face of this Court's decision in *Dickerson*. MAI 8.02 and 24.01, even as modified and given, failed to describe what "injury" was at issue or inform the jury of the elements of Hedgecorth's fear of cancer claim. Pet. App. 79a-80a. In fact, the instructions given plainly did not even mention *Ayers'* "genuine and serious" requirement. *Id.* Nor did the instructions inform the jury that fear of cancer, as a species of negligently inflicted emotional distress, was a distinct element of Hedgecorth's alleged damages. *Id.*

The court below concluded that this requirement was satisfied by MAI 8.02. Pet. App. 17a-18a. Yet, even Missouri's highest court has held that MAI 8.02 alone is not always sufficient to convey the substantive elements of a plaintiff's entitlement to damages under the Federal Employers' Liability Act. *See Kauzlarich v. Atchison, Topeka and Santa Fe Railway Company*, 910 S.W.2d 254, 258 (Mo.banc 1995)(holding that the trial court's refusal to submit a separate mitigation of damages instruction was at odds with federal law on a federal question and in error and noting that MAI 8.02 is insufficient in a FELA case to submit matters of federal substantive law).

The lower court's refusal to look beyond the MAI is in direct conflict with this Court's decisions in *Ayers* and *Dickerson*. In this case, as in *Dickerson*, the Missouri Court of Appeals upheld the trial court's refusal to submit

instructions, which conveyed federal substantive law, simply because these instructions were not set forth in the MAI.

First, the lower court erroneously concluded that "*Ayers* did not discuss or authorize jury instructions" concerning a plaintiff's entitlement to fear of cancer damages and, accordingly, a non-MAI instruction on this issue was not required. Pet. App. 18a-19a. This Court, in *Ayers*, discussed the use of jury instructions in "fear of cancer" cases. It authorized the use of jury instructions, "on a defendant's request," regarding the requirement that a plaintiff must prove that any alleged fear was "genuine and serious." 538 U.S. at 159 n.19. This, the *Ayers* court reasoned, allowed juries to distinguish between valid and invalid claims. *Id.* At least one state has recognized that *Ayers* entitles a defendant to an instruction on this issue. *See* KS-PIKCIV § 132.20 (recognizing that *Ayers* "suggests that [a] defendant would be entitled to an instruction that 'plaintiff must prove any alleged fear to be genuine and serious.'")

Even if *Ayers* did not authorize an instruction on this issue, it is well-settled that the tendered instructions must reflect federal substantive law with respect to damages. *See Kelly*, 241 U.S. at 491; *Dickerson*, 470 U.S. at 411. Because *Ayers* delineated the measure of damages for fear of cancer in a FELA case, the well-settled rule is that the courts should allow a party to instruct the jury on its "genuine and serious" requirement. *Id.* Indeed, this Court has long-recognized that, in awarding damages for mental suffering or emotional distress, "[j]uries must be guided by appropriate instructions and an award of damages must be supported by competent evidence." *Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978). At least one circuit has recognized that this reasoning should not be confined to cases brought under 42 U.S.C. § 1983 and noted that "*Carey* is applicable to all 'cases involving federal

claims for emotional harm.'" *Vadie v. Miss. State Univ.*, 218 F.3d 365, 376, n. 26 (5th Cir. 2000), quoting *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, n.11 (5th Cir. 1996).

It is of paramount importance that this Court ensure that courts apply federal substantive law and do not depart from binding precedent. FELA is intended to create a uniform federal remedy throughout the United States. *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 149 (1917). The failure to convey the requirements for recovery of fear of cancer damages is antithetical to the statutory purpose.

The instruction is particularly important in non-malignant asbestos cases, such as the one brought by Hedgecorth. This Court previously recognized "the danger that no compensation will be available for those with severe injuries caused by asbestos." *Ayers*, 538 U.S. at 169 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598). "Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000." *Id.* In 2003, the year after Hedgecorth filed suit, over 100,000 asbestos claims were filed, "the most in a single year." Editorial, *The Asbestos Blob, Cont.*, Wall St. J., Apr. 6, 2004, *available at* http://pqasb.pqarchiver.com/wsj/access/608896011.html. "[A] large and growing proportion of the claims entering the system in recent years were submitted by individuals[, like Hedgecorth,] who have not incurred an injury that affects their ability to perform activities of daily life." *ABA Commission on Asbestos Litigation Report to the House of Delegates* at 7 *available at http://www.abanet.org/leadership/recommendations03/302.pdf.*

This case illustrates that excessive damages may be awarded to unimpaired FELA plaintiffs if juries are not instructed with respect the elements of their claim. Hedgecorth's self-described concerns about asbestos and cancer hardly portrayed an individual burdened with significant and enduring fears for his health. He maintained a vigorous exercise regimen, professed that he had no physical problems, and continued to smoke cigarettes. Tr. 199, 205, 228, 231-235. There was precious little evidence of Hedgecorth's fear of cancer. Yet, the jury still returned an award of $300,000.00 gross damages. Pet. App. 77a-78a.

For all of these reasons, this Court's review, or in the alternative summary reversal, is warranted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court may wish to consider summarily reversing the decision below.

Respectfully Submitted,

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# APPENDIX

## APPENDIX A

**In The Supreme Court of Missouri**

**SC88098**
**ED86817**

**January Session, 2007**

| | |
|---|---|
| Timothy P. Hedgecorth, Respondent, | ) |
| vs. (TRANSFER) | ) |
| Union Pacific Railroad Company, Appellant. | ) |

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the forgoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2007, and on the 30th day of January, 2007, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 30th day of January, 2007.

/s/Thomas T. Simon _____Clerk

_____D.C.

## APPENDIX B

**In The Missouri Court of Appeals**
**Eastern Division**

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: October 11, 2006

RE: Motions For Rehearing And/Or Transfer to Supreme Court Denied

1. ED86188 STATE OF MISSOURI, RES V JOYCE BATTLE, APP
2. ED86229 STATE OF MISSOURI, RES V MARCO FRANKLIN, APP
3. ED86330 IN THE INTEREST OF: B.D.P. II
4. ED86510 MICHAEL BLACK, APP V U-HAUL COMPANY, RES
5. ED86678 STATE OF MISSOURI, RES V LANCE A COLE, APP
6. ED86773 STATE OF MISSOURI, RES V MICHAEL J JACKSON, APP
7. ED86817 TIMOTHY HEDGECORTH, RES V UNION PACIFIC RR, APP
8. ED86840 STATE OF MISSOURI, RES V DENNIS MATHIS, APP
9. ED86908 STATE OF MISSOURI, RES V TERRY ADAMS, APP

10. ED87027 TAMARA COOPER, APP V ALBACORE HOLDINGS, RES
11. ED87122 ROBERT MOYNIHAN, APP V PATRICK GUNN, RES
12. ED87514 KIM FELD, APP V TREAS OF MO SEC INJ FUND, RES
13. ED87598 JOHN HOFF, RES V ST. CLAIR SCHOOL DIST, APP

## APPENDIX C

**In The Missouri Court of Appeals**
**Eastern Division, Division Three**

**No. ED86817**

**Appeal from the Circuit Court of the City of St. Louis**

**[Filed August 22, 2006]**

| | |
|---|---|
| Timothy P. Hedgecorth, Plaintiff/Respondent, | ) |
| v. | ) |
| Union Pacific Railroad Company, Defendant/Appellant. | ) |

Plaintiff, a railroad employee, filed a lawsuit against his employer, the defendant railroad, under the Federal Employers' Liability Act [FELA], 45 U.S.C. sections 51, *et. seq.*, to recover damages for personal injuries suffered from exposure to asbestos. The jury returned a verdict in plaintiff's favor upon which the trial court entered judgment. On appeal, the railroad claims that the trial court erred 1) in denying its motion for JNOV because, it argues, plaintiff's evidence established only a mere possibility of exposure to asbestos, and 2) in refusing to give the railroad's fear of developing cancer instructions. We affirm.

# FACTUAL BACKGROUND

## 1. The Parties

Plaintiff, Timothy P. Hedgecorth, was an employee of defendant, Union Pacific Railroad Company (Union Pacific), and its predecessor, Missouri Pacific Railroad Company (Missouri Pacific), from 1971 through the time of trial. Missouri Pacific and Union Pacific merged in the mid-1980s. From 1971 until 1983, plaintiff worked on the fifth floor of Missouri Pacific's twenty-two-story office building in St. Louis, Missouri. From 1983, until the building closed in 2004, plaintiff worked on other floors in the building.

## 2. Chronology

Prior to 1970, insulation-wrapped pipes ran under the building's ceilings. These pipes were later covered by dropped ceilings. Sometime after 1971, Missouri Pacific engaged in a remodeling project that involved removing the dropped ceilings and drilling through the floors to run computer wiring.

When Missouri Pacific was removing the dropped ceiling on the fifth floor and drilling through the sixth floor to the fifth floor ceiling in order to run the computer wiring, plaintiff was working on the fifth floor. When the ceiling was removed, the insulation-wrapped pipes in file ceiling were exposed. The insulation around the pipes was in very poor condition, chipping and coming loose. During that construction, which lasted close to a year, dust and larger particles would fall from the ceiling onto plaintiff's and his co-workers' desks. Every morning, plaintiff and his co-workers would have to wipe away a thick, heavy coating of

dust and other particles on their desks with wet towels. The dust and debris collected on the desks several times a day.

In January 1988, Harmon Engineering Associates, Inc. conducted an asbestos survey of the building. Harmon found white to gray paper type insulation material on the straight portion of almost all steam piping and approximately half of the domestic water piping. All forty-three samples taken of this material contained asbestos ranging from fifty-five to one hundred percent. Harmon found white, gray or tan cementitious pipe fitting insulation on the pipe joints, fittings, and valves of almost all of the steam, chilled water, and domestic water piping. Fifty-one of fifty-two samples of this material contained asbestos ranging from twenty to seventy-eight percent. The water piping insulation was moderately friable in fair to poor condition, and was found above the ceiling in the occupied floors one through twenty-two. The steam piping insulation was also moderately friable in fair to poor condition, and was found in the main pipe chase. Additionally, there were asbestos-wrapped chilled water pipes in the main pipe chases and branches to the air handling units on each floor.

The survey reported that although the pipe insulation in the ceiling was protected by the dropped ceiling, the potential for exposure may be increased when disturbed by physical damage or by improperly conducted maintenance operations. The survey recommended the removal of the asbestos-wrapped pipes above the dropped ceilings on all floors.

The "Union Pacific St. Louis Office Building Asbestos Operations and Maintenance Plan" (the Asbestos Plan), dated January 1990, indicated that most of the pipe and duct insulation in the building contained asbestos greater than one percent by volume. The Asbestos Plan assessed the condition

of the asbestos-containing materials in the building from "fair" to "significantly damaged." The Asbestos Plan indicated that routine maintenance tasks could disturb existing asbestos-containing pipe and duct insulation, including electrical service connections, cable pulling through pipe chases, conduit runs through pipe chases, sprinkler system repair, HVAC equipment balancing, and any work in which *asbestos* insulation materials could be accidentally or intentionally disturbed.

In 1996, AMI Group, Inc. provided a Periodic Reassessment of asbestos in the building for Union Pacific. The reassessment indicated that the pipe/duct insulation in the attics was in poor condition with large amounts of debris and dust, which was a cause for concern because the dust was pulled down the pipe chases where it had the potential to spread throughout the building.

In the late 1990s, Union Pacific began the process of having contractors remove asbestos from the building. Among other notices, Union Pacific notified employees that asbestos was being removed from the building, including the fifth floor in the area where plaintiff had previously worked, as well as the eighth floor computer room where plaintiff was then working. Union Pacific also announced that asbestos was being removed from the air handling system.

Prior to July 2000, plaintiff had a chest x-ray taken that was positive for asbestosis. On July 3, 2000, plaintiff consulted Jill Ohar, M.D., a board-certified physician in internal medicine and pulmonary medicine, who had researched and published in the area of asbestos-related lung diseases. At the time of plaintiffs examination, Dr. Ohar was a pulmonary specialist at St. Louis University. Dr. Ohar advised plaintiff that he had a mild case of asbestosis, and

described the serious health problems, including cancer, that were associated with asbestos exposure.

In her videotaped deposition at trial, Dr. Ohar explained asbestosis as the scarring in the lungs that is caused by the inhalation of asbestos fibers and the resulting inflammation. Dr. Ohar testified that inhalation of asbestos fibers causes an inflammatory response in the lungs. Some fibers are cleared, but a large number are retained in the lungs and continue to incite ongoing inflammation that eventually results in scarring. Dr. Ohar further explained that to make a diagnosis of asbestosis, there must be 1) inhalation of asbestos fibers or an exposure, 2) a minimum latency period of ten years, and 3) x-ray evidence of scarring in the lungs or pathologic evidence. Dr. Ohar elaborated that the latency period is required because it takes at least ten years for the scarring to develop from the inflammation caused by inhaled fibers.

Dr. Ohar testified that she obtained an exposure history from plaintiff. Plaintiff told her about the constant remodeling and how he would enter his work area and find his computer and desk covered with thick dust from the remodeling. He also told her about Union Pacific's subsequent efforts to clean out asbestos tiles and remove asbestos from the dropped ceiling and around pipes above him. Dr. Ohar reported that plaintiff's x-ray showed mild scarring on the lungs and that two other doctors who read the x-ray, including a board certified radiologist and a B-reader, concurred.

Dr. Ohar gave her opinion to a reasonable degree of medical certainty that plaintiff had a very mild case of asbestosis on July 3, 2000. She based her opinion on her examination and testing of plaintiff; plaintiffs description of his history of asbestos exposure; the latency period; the radiographic findings, including the chest x-ray that

demonstrated abnormalities consistent with asbestosis; and her medical background. Dr. Ohar further testified that after reviewing the medical reports of Union Pacific's experts, her diagnosis was unchanged.

Dr. Ohar testified that exposure to asbestos under the circumstances described by plaintiff would cause plaintiff's asbestosis. Dr. Ohar also testified that if the dust on plaintiff's desk had been asbestos-related dust, then the asbestos waste could have caused exposure levels that were as bad as that caused by the actual removal of asbestos from the pipes. Dr. Ohar cited as authority several published papers that demonstrated that sweeping or cleaning up asbestos waste caused these similar exposure levels.

## PROCEDURAL BACKGROUND

On February 1, 2002, plaintiff filed a petition against Union Pacific to recover damages under the Federal Employers' Liability Act [FELA], 45 U.S.C. section 51, *et. seq.*, for his injuries from asbestos exposure. The case was tried before a jury. During the instruction conference, Union Pacific offered two not-in-MAI instructions addressing recovery of damages based on emotional distress from fear of developing cancer, which the trial court rejected. The jury returned a verdict assessing eighty percent fault to Union Pacific and twenty percent fault to plaintiff. The jury found the total amount of plaintiff's damages, disregarding plaintiffs fault, to be $300,000.00. The trial court entered judgment

against Union Pacific in the amount of $240,000.00. Union Pacific raises two points on appeal.[1]

DISCUSSION

I. Submissibility

In its first point, Union Pacific asserts that the trial court erred in denying its motion for judgment notwithstanding the verdict because plaintiff failed to make a submissible case in that plaintiff's evidence established only a mere possibility of asbestos exposure. Union Pacific argues specifically that Dr. Ohar's diagnosis of asbestosis could not be considered evidence of plaintiffs exposure to asbestos because Dr. Ohar's diagnosis assumed that plaintiff had been exposed to asbestos, based on plaintiffs self-reported history of exposure. Union Pacific further argues that plaintiff's remaining evidence of his alleged asbestosis is speculative because plaintiff failed to establish that he was exposed to airborne asbestos fibers, and Union Pacific's evidence that plaintiff was not exposed to asbestos was not rebutted.

We review the trial court's denial of a motion for judgment notwithstanding the verdict to determine if the plaintiff made a submissible case. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000). A plaintiff makes a submissible case if each and every fact essential to liability is predicated on legal and substantial evidence. *Id.* In determining submissibility, we view the evidence and all reasonable inferences in the light most

---

[1] We do not review errors raised in the argument portion of a brief that are not set out in the point relied on. *Chancellor Development Co. v. Brand*, 896 S.W.2d 672, 678 (Mo. App. 1995).

favorable to the verdict, and we disregard all contrary evidence and inferences. *Id.* Whether evidence is substantial and whether the inferences drawn are reasonable are questions of law that we review *de novo*. *Savory v. Hensick*, 143 S.W.3d 712, 716 (Mo. App. 2004). We will not reverse a jury's verdict unless there is a complete absence of probative fact to support the jury's conclusion. *Giddens*, 29 S.W.3d at 818.

In determining whether plaintiff produced sufficient evidence to make a submissible case under FELA, we apply federal law. *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949); *Briggs v. Kansas City Southern Ry. Co.*, 925 S.W.2d 908, 911 (Mo. App. 1996). A trial court should submit a case to the jury if there is any evidence to support the employer's negligence. *Zibung v. Union Pacific R. Co.*, 776 S.W.2d 4, 5 (Mo. banc 1989). To make a submissible FELA case, an employee must show that 1) the employer had a duty to provide a reasonably safe work place, 2) the employer's lack of care played some part, however slight, in producing the injury, and 3) the injury was reasonably foreseeable. *Ramsey v. Burlington North. & Santa Fe Ry.*, 130 S.W.3d 646, 651 (Mo. App. 2004). Evidence of an employer's negligence can be slight or minimal. *Zibung*, 776 S.W.2d at 5.

> It is well established that the quantum of evidence required to establish liability in a FELA case is much less than in an ordinary negligence action. *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir.1990). A trial judge must submit a FELA case to the jury when there is even slight evidence of negligence. *Id.* The test is simply whether the evidence justifies with reason the conclusion that employer negligence played any part, even the

> slightest, in producing the employee's injury. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

*Duncan v. American Commercial Barge Line*, 166 S.W.3d 78, 83 (Mo. App. 2004). *See also Giddens*, 29 S.W.3d at 818; *Ramsey*, 130 S.W.3d at 651.

Asbestosis is a cognizable injury under FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 148, 123 S.Ct. 1210, 1218, 155 L.Ed.2d 261 (2003).

Union Pacific first argues that plaintiff did not make a submissible case because Dr. Ohar did not give an opinion on whether plaintiff had been exposed to asbestos, and her opinion that plaintiff has asbestosis is not in itself proof that plaintiff was exposed to asbestos because her diagnosis was based on plaintiff's self-reported history of exposure. This argument does not affect the submissibility of plaintiff's case because plaintiff did not depend on Dr. Ohar to give an opinion that he was exposed to asbestos, and, as set forth below, plaintiff adduced substantial evidence from which the jury could infer exposure.

This takes us to Union Pacific's second argument under this point, which is that plaintiff's other evidence of his alleged asbestos exposure was speculative. Union Pacific contends that none of plaintiff's evidence supported an inference that plaintiff was exposed to airborne asbestos fibers. We disagree.

Plaintiff adduced evidence of the presence of asbestos throughout the building, including in the insulation on the overhead pipes and in the air handling system. Plaintiff also adduced evidence of the construction work around the

asbestos-insulated pipes in the 1970s that created substantial dust on a daily basis in plaintiffs work area. The Asbestos Plan indicated that electrical work and drilling around asbestos-insulated pipes could disturb the asbestos. Dr. Ohar testified that inhalation of asbestos fibers causes asbestosis, and that if the dust created in plaintiff's work environment contained asbestos fibers, exposure to asbestos under the circumstances described by plaintiff would have caused plaintiff's asbestosis. There was sufficient evidence from which a jury could find asbestos was present, disturbed, and released in plaintiff's work environment, and that plaintiff was therefore exposed to asbestos.

Union Pacific claims that it produced unrebutted evidence that the asbestos-containing materials in the building produced only a miniscule level of airborne asbestos fibers. Under our standard of review, we do not consider Union Pacific's contrary evidence and inferences. *Giddens*, 29 S.W.3d at 818. We disregard all evidence that does not support a plaintiff's case. *See Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. 1997). There was sufficient evidence of causation to submit the issue for the jury. Point one is denied.

II. Refusal of Instructions

In its second point, Union Pacific first asserts that the trial court erred in refusing to give to the jury either of its proposed not-in-MAI instructions explaining when damages for emotional distress based on a fear of developing cancer may be recovered. Union Pacific argues that it was entitled to jury instructions that reflected the holding in *Ayers*, 538 U.S. at 157, that FELA permits damages to be recovered for emotional distress based on a fear of developing cancer if that fear is "genuine and serious."

Union Pacific complains that the following proferred instructions were not submitted to the jury:

Instruction No. A

In determining whether plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. In order to award damages to plaintiff for any emotional distress, you must be persuaded, by a preponderance of the evidence, that his emotional distress is an actual injury.

In making this determination, you may take into account whether or not plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

Unless you determine that their fear is genuine and serious, and he has suffered actual emotional injury as a result of this fear, you cannot find for the Plaintiffs.

Instruction No. B

In order to find in favor of plaintiff for emotional distress resulting from any reasonable fear of

developing cancer as a result of asbestosis, you must believe:

> First, plaintiff suffers actual emotional injury as a result of his fear of cancer relating to asbestosis; and
>
> Second, plaintiff has taken actions indicating more than a general concern about his future health or has demonstrated physical symptoms as a result of his fear of cancer.

The court rejected these instructions and gave Union Pacific's Instruction 9, which was a comparative fault instruction based on MAI 8.02.[2]

---

[2] Instruction No. 9

> If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in evidence. You must state such total amount of plaintiff's damages in your verdict.
>
> In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiffs total damages by any percentage you assess to plaintiff. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income taxes.

The propriety of jury instructions on the measure of damages in FELA cases is a substantive issue governed by federal law. *See Clark v. Missouri & Northern Arkansas R.R.*, 157 S.W.3d 665, 671 n.3 (Mo. App. 2004). However, the form of the instructions and the manner in which the substantive law is submitted to the jury in FELA cases are procedural issues governed by state law. *Dunn v. St. Louis-San Francisco Ry. Co.*, 621 S.W.2d 245, 254 (Mo. banc 1981); *Cupp v. National R.R. Passenger Corp.*, 138 S.W.3d 766, 773 n.1 (Mo. App. 2004). The use of instructions approved by the Missouri Supreme Court for use in FELA cases "is mandatory to the exclusion of all others." *Griffith v. St. Louis-San Francisco R. Co.*, 559 S.W.2d 278, 280 (Mo. App. 1977), *cert. denied,* 436 U.S. 926, 98 S.Ct. 2821, 56 L.Ed.2d 769 (1978). Thus, if MAI 8.02 is applicable, it must be given. *Gilliam v. Chicago & North Westem Transp.*, 859 S.W.2d 155, 161-62 (Mo. App. I993)

In FELA cases, MAI 8.02 governs damages for an injury to an employee. *Id.* "Other than the references to taxation, present value, and mitigation of damages, it is essentially the same as MAI 4.01 with the exception that the word 'direct' is deleted from the fifth line of MAI 4.01." MAI 8.02, Committee Comment (1996 Revision). MAI 8.02, like MAI 4.01, does not list or explain the elements of damages. This is to avoid the risk "of the jury being improperly instructed on damages not supported by the record." MAI 4.01, Committee Comment (2002 Revision). If is anticipated that counsel will tell the jury in argument what the lawful items of damages are and which damages are supported by the record. *Id.; see also* MAI, Why and How to Instruct a Jury, LXXII (6th ed. 2002).

In this case, MAI damage instruction 8.02 was given; any further explanation by instruction was not acceptable procedure under MAI. *See Dunn*, 621 S.W.2d at 253;

*Marshell v. Burlington Northern, Inc.*, 637 S.W.2d 168, 169 (Mo. App. 1982); *Brazell v. St. Louis Southwestern Ry. Co.*, 632 S.W.2d 277, 285 (Mo. App. 1982); Rule 70.02(b). MAI 8.02 allowed counsel to argue the facts of pain and suffering to the jury, including emotional distress. *See Duncan*, 166 S.W.3d at 86-87 (involving same language in MAI 8.01). Under MAI practice, emotional distress resulting from plaintiff's fear of developing cancer was submitted by the "any damages" language in MAI 8.02, and the detail of these damages was reserved for counsel's argument.

Union Pacific argues that *Ayres* requires an addition to the MAI instruction. We have no authority to decide that an applicable MAI instruction must be supplemented to conform to case law. *Marshell*, 637 S.W.2d at 169. *See also Botanicals on the Park, Inc. v. Microcode*, 7 S.W.3d 465, 470 (Mo. App. 1999). If we believe that the MAI instructions misstate or do not fully state the law, our only course of action is to transfer the appeal to the Missouri Supreme Court. *Lindsay v. McMilian*, 649 S.W.2d 491, 494 (Mo. App. 1983).

We conclude that there is no reason to transfer this appeal because *Ayres* does not require not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer. In *Ayres*, plaintiffs had been diagnosed with asbestosis caused by exposure to asbestos at their workplace. 538 U.S. at 141. Plaintiffs pursued a claim for damages in state court, including damages for mental anguish, resulting from their fear of developing cancer. *Id.* at 142. The railroad employer sought a jury instruction that disallowed fear of cancer damages except for those plaintiffs who proved both "an actual likelihood of developing cancer" and "physical manifestations" of the alleged fear. *Id.* at 143. The trial court rejected this instruction, and instead, instructed that "[A]ny plaintiff who has demonstrated that he has developed a

reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Id.*

The Court held that the "mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable asbestosis caused by work-related exposure to asbestos." *Id.* at 141. However, although the state trial court in *Ayres* had instructed the jury on damages for fear of developing cancer, the Court in *Ayres* did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law. Since the form of instructions is a matter of Missouri law, the *Ayres* holding does not require a change to the form of approved MAI instructions.

Tendered instructions A and B were not authorized by MAI. The trial court did not err in rejecting them. Point two is denied.

The judgment of the trial court is affirmed.

/s/Kathianne Knaup Crane
Kathianne Knaup Crane, Presiding Judge

Lawrence E. Mooney, J. and Booker T. Shaw, J., concur.

## APPENDIX D

**In The Circuit Court of Missouri of the City of St. Louis State of Missouri**

**Cause No. 022-337**
**Division No. 11**

**[Filed May 19, 2005]**

| | |
|---|---|
| Timothy P. Hedgecorth, Plaintiff, | ) |
| v. | ) |
| Union Pacific Railroad Company, Defendant. | ) |

## DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, REMITTITUR

COMES NOW Defendant Union Pacific Railroad Company ("Union Pacific"), by and through counsel, and for its Motion for New Trial or, in the alternative, Remittitur as follows:

1. Plaintiff Timothy P. Hedgecorth ("Plaintiff"), a clerical employee of Union Pacific, filed this action pursuant to the Federal Employers' Liability Act ("FELA"),

45 U.S.C. § 51, *et seq.*, alleging that he developed an asbestos-related disease as a result of exposure to airborne asbestos while working in the Union Pacific office building located at 210 N. 13th Street in St. Louis, Missouri.

2. The Court entered judgment in the amount of $240,000.00 on the jury's $300,000 verdict in favor of Plaintiff in which it assessed Plaintiff twenty percent (20%) of the fault. Union Pacific is entitled an Order granting it a New Trial based upon a multitude of errors. In the alternative, Union Pacific requests a substantial remittitur.

3. In further support, Union Pacific hereby incorporates by reference its accompanying Memorandum of Law filed contemporaneously herewith.

WHEREFORE, Defendant Union Pacific Railroad Company respectfully requests that the Court enter an Order granting a new trial or, in the alternative, a substantial remittitur.

Respectfully submitted,

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Attorneys for Defendant
Union Pacific Railroad Company

**IN THE CIRCUIT COURT OF MISSOURI OF THE CITY OF ST. LOUIS STATE OF MISSOURI**

**Cause No. 022-337**
**Division No. 11**

**[Filed May 19, 2005]**

| | |
|---|---|
| Timothy P. Hedgecorth, Plaintiff, | ) |
| v. | ) |
| Union Pacific Railroad Company, Defendant. | ) |

**DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MEMORANDUM IN LAW IN SUPPORT OF ITS MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR**

COMES NOW Defendant Union Pacific Railroad Company ("Union Pacific"), by and through counsel, and for its Memorandum of Law in Support of its Motion for anew Trial, or in the alternative, Remittitur states as follows:

## INTRODUCTION

Plaintiff Timothy P. Hedgecorth ('Plaintiff'), a clerical employee of Union Pacific, filed this action pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, alleging that he developed an asbestos-related disease

as a result of exposure to airborne asbestos while working in the Union Pacific office building located at 210 N. 13th Street in St. Louis, Missouri ("St. Louis office building"). The Court entered judgment in the amount of $240,000.00 on the jury's $300,000,00 verdict in favor of Plaintiff, after reducing the amount for the twenty percent (20%) fault assessed to Plaintiff.

Union Pacific is entitled an Order granting it a new trial and/or substantial remittitur based upon a multitude of errors committed during the trial. First, the Court allowed the testimony of witnesses only disclosed at most ten (10) days prior to the trial, which entirely changed the complexity of the exposure allegations against Union Pacific from Plaintiff's prior deposition testimony and Plaintiff's written discovery responses. In addition, the Court's admission of the recently disclosed co-worker testimony was extremely prejudicial, irrelevant, misleading and unfounded since the co-workers were allowed to characterize materials in the building as containing asbestos, despite a complete lack of expertise or qualifications to identify asbestos-containing products, and were allowed to provide unreliable irrelevant lay testimony concerning purported asbestos products and potential exposures in areas where Plaintiff never worked and for time periods when Plaintiff was not in the same area or location. This testimony was completely different from Plaintiff's original claimed exposures and the evidence discovered up to trial and created an entirely misleading and unreliable mischaracterization of continuous and systematic exposures to asbestos, despite there being no credible scientific or fact evidence to support this testimony.

Second, the Court erred in refusing to submit Tendered Instructions A through F to the jury and in submitting Instruction No. 8 based upon MAI 32.07(B). For instance, the

Court refused to submit Tendered Instructions A or B to define the very specific proof requirements pertaining to any fear of cancer claims for asbestosis, as set forth by the United States Supreme Court in *Norfolk and W. Ry. Co. v. Ayers*, 123 S.Ct. 1210 (2003). Without such an instruction, the jury was given discretion to award Plaintiff monetary damages based upon fear of cancer without any guidelines whatsoever to determine whether his stated fear was compensable. In addition, the instructions submitted, including specifically Instructions 7 and 9, allowed the jury to assume that **any expression of fear** is an **injury** that is compensable in and of itself. Tendered Instructions C through F also correctly stated the law and the evidence adduced at trial and their absence, particularly with the submission of Instruction No. 8, created jury confusion, misstated the law, severely prejudiced Union Pacific and created reversible error.

Third, the Court erred by allowing the admission into evidence of the reports of Richard B. Levine, M.D. and M. Sundarem, M.D., expert witnesses identified by Plaintiff, despite Plaintiff's failure to produce these individuals for deposition as required by the Court's scheduling order and after repeated requests by Union Pacific. This error was further compounded by granting Plaintiff's objection to Union Pacific's closing argument requesting the jury to draw an adverse inference from Plaintiff's failure to produce these witnesses at trial.

Fourth, the jury's verdict is against the weight of the evidence and is grossly excessive given the lack of evidence of damages suffered by Plaintiff. Plaintiff offered absolutely no evidence of loss of past or future wages or reduced earning capacity. Evidence of any pain and suffering was also non-existent. To the extent that Plaintiff attempted to present any evidence of emotional distress damages for fear of cancer, this

evidence was wholly insufficient to justify an award of damages, particularly in light of the strict criteria established by the *Ayres* Court for the award of such damages. Accordingly, the jury's verdict should be reversed and a new trial ordered or, at the very least, a substantial remittitur of damages should be ordered.

Finally, the Court committed reversible error based on numerous other rulings, including: (1) the exelusion of evidence of medications taken by Plaintiff for depression prior to his alleged diagnosis of asbestosis; (2) the limitation of testimony by Union Pacific's experts concerning their inspection of the St. Louis office building, particularly given the unreliable and unfounded lay opinion testimony of Plaintiff and his co-workers, (3) the introduction of evidence concerning the knowledge of "Railroad Doctors" in 1935; (4) allowing Plaintiff to introduce the deposition, including cross-examination, of Dr. Herbert Shapiro in Plaintiff s case; and (5) the exclusion of portions of the videotaped deposition of Jill Ohar, M.D., taken by Union Pacific after Plaintiff presented Dr. Ohar's in his case.

## ARGUMENT

### A. The Exposure Testimony of Plaintiff, Vicki Kalal, Frances Beltz, Earl Chilton and Cheri L. Jones amounted to Inadmissible Lay Opinion Testimony

Plaintiff offered only his own testimony and the testimony of four co-workers to establish his alleged exposure to asbestos - the ultimate issue in this case. However, all of this testimony was unreliable lay opinion testimony without any credible basis to establish asbestos exposure. Moreover, Plaintiff did not even identify these witnesses until ten (10) days prior to trial.

According to the Plaintiff, there were two places in the building and two instances where he believed he was exposed to asbestos:

1) In the mid-1970's, renovation work was occurring around his work station in the fifth floor annex. Trial Tr. at 186, line 6-188, line 21, 190, line 10-191, line 7. For several months, Plaintiff testified that he would come in to work in the morning and had to wipe his desk down with a wet paper towel to remove the dust that had accumulated overnight. *Id.* at 190, line 21-191, line 7. He testified that this wiping proeedure took a minute or so. *Id.* at 216, lines 20-21.

2) In the mid-1980's, when Plaintiff was working in the computer room on the eighth floor, he saw men in protective suits on site to remove asbestos behind a wall *Id.* at 193, line 9-194, line 7. This occurred on one evening. *Id.* Significantly, Hedgecorth admitted that he has no information that would qualify him to identify asbestos-containing material. *Id.* at 216, line 25- 217, line 3.

Vicki Kalal ("Kalal") had a desk next to Plaintiff in the fifth floor annex for some period of time. Trial Tr. at 110, line 21-111, line 5. She could not recall, however, when or how long she worked with Plaintiff. *Id.* at 120, lines 10-18. Kahal testified that she believed there was asbestos material in the building; she based this belief largely on the notices which came out concerning abatement in the 1990s, which instructed employees to stay away from areas where abatement work was being done. *Id.* at 116, line 13-117, line 19, 118, line 22-119, line 8. With regard to asbestos-containing products, she testified over the objection of Union Pacific as follows:

Q. So the pipes that you talked about earlier do you believe that those had exposure to asbestos?

MR. COWAN: Objection, leading, lack of foundation of this witness.

THE COURT: Overruled.

Q. (By Mr. Hagerty): Go ahead.

A. What was the question?

Q. The pipes that you were working under when this dust was coming down, did you believe those had been wrapped in asbestos?

A. Oh, yes.

*Id.* at 117, lines 9-19.

Q. (By Mr, Hagerty): In the stairwells that you used, typically, did you observe asbestos in the stairwells?

A. I don't -

MR. COWAN: Objection. Lack of Foundation and expertise. Objection.

THE COURT: Overruled.

Q. (By Mr. Hagerty): Go ahead.

A. Until they did the major remodeling in the stairwell everything was pretty dirty, so I wouldn't be aware of what it was, but you didn't see stuff laying around.

*Id.* at 118, line 22-119, line 8. Kalal admitted that she had no ability or expertise to identify asbestos-containing products nor did she have any specific knowledge as to where any asbestos-containing products were located in the building. *Id.* at 120, line 25-121, lines 5, 16, 21.

Francis Beltz ("Beltz") also testified as to her observations of renovations and abatement procedures at the building. *Id.* at 128, line 17-129, line 19, 131, line 16-132, line 5, 141, lines 17-21. Beltz testified that she worked on the eighth floor when Plaintiff worked in the computer room on this floor. *Id.* at 128, lines 10-16. She could not remember when they worked on the eighth floor at the same time. *Id.* at 150, lines 2-20. She testified, with regard to the eighth floor, as follows:

Q. Now I want to ask you about the 8th floor, Fran, in particular. Did there come a time when you believe looking back that you were exposed to asbestos there?

MR. COWAN: Objection, Your Honor, lack of foundation and lack of expertise.

THE COURT: Overruled.

Q. (By Mr. Hagerty): Go ahead.

A. Yes. The year 1970 to '71 when we were working as key punch operators they enclosed us in this plastic and they were removing one wall to add an extra room to the department and they were removing the sinks. We had sinks we actually used to wash up and they were removing the sinks, and the piping, and the plaster, and the floor, and there was so much debris.

> It was like snow in there, and we used to sometimes sit there with our coffee and put our IBM cards on top of the coffee cup so it wouldn't fill up with the debris that was all around us. We would go home and our hair would be white. Of course they had plastic up, but the plastic enelosed us. We were enclosed within that plastic.

*Id.* at 128, line 17-129, line 12. Beltz also testified as to remodeling on the second floor-even though Plaintiff did not work on this floor. *Id.* at 134, line 23-135, line 9. She testified as to conditions on the fifth floor, including by referring to pictures of this floor - Plaintiffs Exhibits 28 and 30, which were introduced into evidence - even though she admitted that Plaintiff did not work in this area at the same time. *Id.* at 137, line 5-140, line 22, 150, line 21-151, line 11, 155, line 23-158, line 10. Belz admitted that she had not been trained in identifying asbestos-containing products and did not know how to determine whether or not specific products contained asbestos. *Id.* at 143, line 25-144, line 5.

Earl Chilton ("Chilton") testified on behalf of Plaintiff. His only experience with Plaintiff was working with him sometime in the 1970s on the Fifth Floor. *Id.* at 296, lines 8-10. He also offered testimony concerning the presence of asbestos-containing products in the office building:

> Q. Were they insulated then, those pipes?
>
> A. I would assume that's what the asbestos did.
>
> MR. COWAN: Objection, Your Honor.
>
> THE COURT: Overruled.

*Id.* at 280, line 25-281, line 3. *See also id.* 284, line 6-291, line 12, 292, line 9-294, line 22, 298, line 21-301, line 8. Chilton, like the other lay witnesses admitted that he had no qualifications to identify asbestos versus non-asbestos products. *Id.* at 296, lines 4 - 7.

Furthermore, Cheri L. Jones testified as to dusty conditions during a two week time period on the fifth floor main, even though she testified that Plaintiff worked on five annex during this time. *Id.* at 250, line 24-251, line 5, 252, lines 9-13, 253, lines 12-19. Jones testified to dusty condition on other floors - without regard to Plaintiff's presence on these floors during the same time period. *Id.* at 255, line 18-256, line 8, More importantly, Jones only testified that the work environment was sometimes dusty, but never testified, and could not have testified, that the dust contained asbestos. *Id.* at 244, line 18, 272, line 11.

In Missouri, "[a] lay witness generally cannot render an opinion as to the ultimate issue in a case." *Mohr v. Mobley*, 938 S.W.2d 319, 322 (Mo. App. 1997). According to the Mohr court:

> Section 490.065 RSMO 1994 authorizes an expert witness to render an opinion on an ultimate issue in a case 'if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' .... We are not aware of any authority, however, which suggests that lay opinion testimony should be admitted as to the ultimate issue of the ease. The long-standing rule is to the contrary.

*Id.* The *Mohr* court also noted,

> ... [lay] witnesses generally do not give opinions or make conclusionary statements in their testimony, unless they personally observed events, in which case they may testify to their comprehension of what they have seen in a descriptive manner which actually constitutes a conclusion, opinion, or inference, 'if the inference is common and accords with the ordinary experiences of everyday life.'

938 S.W.2d at 322-323.

The expert testimony of plaintiff and his co-workers is necessarily inadmissible lay opinion about whether Plaintiff was exposed to asbestos at Union Pacific or not. It is opinion testimony because none of the witnesses knew for a fact whether the dust or the pipes they observed contained asbestos. It was their "opinion" that this was the case because they simply knew that it was for various, speculative reasons. These opinions were of the "inadmissible lay" variety because none of the witnesses who gave them possessed the expertise to distinguish a material or cloud of dust that contained asbestos from a material or cloud of dust that did not. If any witness did possess that expertise, evidence of that ability was never established and the opinions fail for lack of foundation.

To analogize, trial counsel in toxic tort cases tend to read a lot of medical articles and may know a fair amount about the medical aspect of such cases. However, no Court would allow such an attorney to give opinions from the witness stand about medical issues. Mr. Hedgecorth and his co-workers, mostly clerical employees at the railroad, face the same restraints in their opinion testimony. At trial, they were allowed to venture far beyond their areas of expertise when they opined about the plaintiffs "asbestos exposure" at the St. Louis office building. It was simply inadmissible lay opinion.

In FELA cases, it has been established that this kind of lay opinion is not sufficient to establish exposure to toxic substances. In *Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit affirmed a grant of summary judgment in a toxic tort case brought by a seaman's widow pursuant to the Jones Act. The trial court had excluded the testimony of the plaintiff's medical causation expert on the ground, *inter alia*, that he relied on a co-worker's account of toxic exposure to conclude that the plaintiff had been injured as a result of exposure to chemicals while on board ship:

> [The medical expert's] proposed expert testimony on the issue of dosage amount also relied on the affidavit testimony of...a seaman who worked on the same ships as decedent for a period of five months. In his affidavit, [the seaman] averred that he and other seamen had suffered from various ailments that could be attributed to harmful exposure to toxins [and] referred to conversations that he had with decedent regarding decedent's symptoms of exposure to dangerous toxins. Based on these observations, [the seaman] opined that decedent was exposed to a harmful dose of toxins while aboard defendants' ships. [The medical expert] relied on [the seaman's] testimony in concluding that exposure to toxins while aboard defendants' ships was the cause of decedent's squamous cell carcinoma. The district court, however, found Miller's testimony insufficient to support expert testimony....
>
> We agree with the district court that [the seaman's] testimony was insufficient to establish that decedent had been exposed to a harmful amount of toxins or that such exposure caused his cancer. *First, ... a*

> *seaman lacked the "practical experience and necessary academic training" to analyze and quantify the dosage of the toxins* emitted aboard defendants' ships.... *Absent Some technical or professional expertise in detecting and quantifying toxic emissions, [the seaman's] testimony was insufficient to establish dosage amount.*

379 F.3d at 49 (emphasis added) (citations omitted). Obviously, the identification of asbestos-containing products and the assessment of the amount of exposure an individual might have are not within the "ordinary experiences of everyday life" of a clerical employee who works in an office building. Such conclusions require significant industrial hygiene or engineering expertise.

The prejudice caused by the testimony of Plaintiff, Kalal, Beltz, Chilton and Jones, in addition to the admission of Exhibits 28 and 30, struck at several levels. This testimony inflamed and prejudiced the jury against Union Pacific by implying that workers at the office building located at the St. Louis office building - including Plaintiff - were exposed to high concentrations of asbestos fibers throughout the course of their employment, even though these individuals had absolutely no basis for reaching these conclusions. *See also* Def. Union Pacific Railroad Company's Mot. in Limine regarding Co-Worker Test. The prejudice to Union Pacific was compounded by the fact that the Court excluded the testimony of Plaintiff's expert, Jill Ohar, M.D., where she stated that she "would have to rely on an industrial hygienist" to determine if dust contained asbestos fibers. Trial Tr. at 765, lines 7-18; 2/8/05 Videotaped Dep. of Jill Ohar, M.D. by Defendant at 53, line 15-18 attached hereto as Exhibit A and incorporated herein by reference.

Union Pacific was further prejudiced by the witnesses' inability to relate any purported exposures directly to Plaintiff. In fact, the witnesses could not link the purported exposures to floors on which Plaintiff worked or the timeframe during which he worked on these floors. In Missouri, "[e]vidence of similar facts, conditions, or occurrences is generally inadmissible unless conditions are demonstrated to be the same." *Dillman v. Missouri Highway and Transportation Commission*, 973 S.W.2d 510, 512 (Mo. App. E.D. 1998); *Govreau v. Nu-Way Concrette Forms, Inc.*, 73 S.W.3d 737, 743 (Mo. App. E.D. 2002). "Such evidence must be of an accident of like character, occurring under substantially the same conditions, and it must be one resulting from the same cause. *Dillman*, 973 S.W.2d at 512.

This baseless testimony misled and distracted the jury from the issue of Plaintiff's individual exposure to asbestos, leaving them with the impression that he was, in fact, exposed to harmful levels of asbestos fibers numerous times over many years and/or as a result of the cumulative renovations at this building over the years. *See* Def. Union Pacific Railroad Company's Mot. in Limine to Exclude Evidence or Test. Concerning Repairs to, Abatement Work on and/or the Presence of Asbestos-Containing Products on any Floors other than those Floors where Pl. Timothy Hedgecorth Worked; Def. Union Pacific Railroad Company's Mot. in Limine to Exclude Evidence or Test. From any Individuals who Worked on Floors other than those Floors where Pl. Timothy Hedgecorth Worked. These errors were also compounded by the Court's failure to limit this testimony to a relevant time period, thereby giving the jury the impression that the all the purported occurrences were when the co-workers worked with Plaintiff and were relevant to an assessment of Plaintiff's exposures and resulting injury, even though any exposures after 1990 were not relevant as urged by Union Pacific in its

Motion in Limine. *See* Def. Union Pacific Railroad Company's Mot. in Limine to Exclude any Evidence or Test Regarding Any Exposure after 1990. *See also* Def. Union Pacific Railroad Company's Mot. in Limine to Exclude any Evidence or Testimony regarding any Exposures prior to the Commencement of Abatement Work. The net effect of these errors left the jury with an extremely overinflated and distorted perception of the presence of asbestos-containing products in the St. Louis office building and of Plaintiff's purported exposures at this location.

Union Pacific suffered further prejudice because Plaintiff failed to seasonably identify these witnesses in accordance with the Missouri Rules of Civil Procedure, thereby denying Union Pacific the opportunity to conduct adequate discovery with regard to the issues raised by these witnesses. *See* Def. Union Pacific Railroad Company's Mot. in Limine to Exclude the Trial Testimony of Any Witnesses not Identified during Discovery by Pl. Timothy Hedgecorth; Trial Tr. at 272, line 25 - 274, line 21. "The rules of discovery are designed to allow the litigants to determine the facts prior to trial, obtain access to information about the respective contentions, to preserve evidence, **prevent concealment and unjust surprise**, and formulate issues for trial." *Moore v. Weeks*, 85 S.W.3d 709, 722 (Mo. App. W.D. 2002)(emphasis added). Where, as in this case, a party has consciously avoided identifying witnesses in its discovery responses, settled Missouri case law supports the exclusion of the undisclosed witnesses at trial. *See Moore*, 85 S.W.3d at 722 (excluding a witness who had not been identified in response to discovery and was to testify concerning a matter of public record); *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648-50 (Mo. Banc 1997)(excluding testimony of treating physician on the issue of causation as a sanction for plaintiff's failure to identify this witness in answers to interrogatories); *Sample v. Witt*, 712

S.W.2d 394, 397 (Mo. App. W.D. 1986)(excluding testimony of a witness not identified in answers to interrogatories).

Granted, Union Pacific deposed these witnesses prior to their trial testimony, but during the trial itself. As a result, Union Pacific had only limited time, thirty (30) to forty-five (45) minutes in each case, to take the deposition and, therefore, did not have adequate time to inquire into the scope of these witnesses' knowledge, investigate any of the issues raised by their testimony and prepare to respond to their testimony.

Accordingly, the Court should Order a new trial based upon the admission of this unreliable lay opinion testimony which was prejudicial to Union Pacific and substantially affected the verdict in favor of Plaintiff. *See, e.g., Hawley v. Merritt*, 452 S.W.2d 604, 612 (Mo. App. 1970); *Rogers v. Toro Manufacturing Company*, 522 S.W.2d 632, 639 (Mo. App. 1975).

**B. The Court Erred in its Instructions**

The Court erred in rejecting Defendant's Tendered Instructions A through F and giving Instruction No. 8 based upon MAI 32.07(B).

1. Instructions A and B.

Tendered Instructions A and B instructed the jury on the issue of emotional distress damages based upon his alleged fear of developing cancer. Trial Tr. at 763, line 6-764, line 6. Instructions A and B were as follows:

Instruction No. A

In determining whether plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. In order to award damages to plaintiff for any emotional distress, you must be persuaded, by a preponderance of the evidenee, that his emotional distress is an actual injury.

In making this determination, you may take into account whether or not plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

Unless you determine that his fear is genuine and serious, and he has suffered actual emotional injury as a result of this fear, you cannot find for [plaintiff].

Instruction No. B

In order to find in favor of plaintiff for emotional distress resulting from any reasonable fear of developing cancer as a result of asbestosis, you must believe:

First, plaintiff suffers actual emotional injury as a result of his fear of cancer relating to asbestosis; and

Second, plaintiff has taken actions indicating more than a general concern about his future health or has demonstrated physical symptoms as a result of his fear of cancer.

There is no MAI instruction on the issue of emotional distress damages for fear of cancer. "When no MAI instruction is available the jury must be instructed on the applicable rules of law under an appropriate instruction which follows the law and is so composed that a jury of ordinary people can understand it." *McMullin v. Borgers*, 806 S.W.2d 724, 730 (Mo. App. 1991).

Plaintiff's claim for emotional distress damages has very specific proof requirements set forth by the United States Supreme Court. In *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210 (2003), the Supreme Court was specifically faced with the question of "whether a [FELA] plaintiff [who has been diagnosed with asbestos]...can recover damages for fear of [asbestos-related] cancer...without proof of physical manifestations of the claimed emotional distress." 123 S.Ct. at 1223 [emphasis added]. The court responded to this question as follows:

Our answer is yes, with *an important reservation.* We afffirm *only* the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages. It is incumbent upon such a complainant, however to prove that his alleged fear is *genuine and serious*....

123 S.Ct. at 1223 (emphasis added). The Supreme Court specifically stated that it was not ruling on the sufficiency of the evidence of emotional distress presented by the *Ayers* plaintiffs, 123 S.Ct. at 1224, but cited two cases as guidance for its "genuine and serious" requirement. As noted in the decision, the Fifth Circuit in *Smith v. ACandS, Inc.*, 843 F.2d 854, 859 (5th Cir. 1988) found that an asbestotic's testimony voicing a "general concern for one's future health" was insufficient as a matter of law to prove emotional distress damages for fear of cancer. On the other hand, the court referred to *Coffman v. Keene Corp.*, 608 A.2d 416 (N.J. App. 1992), in which a plaintiff's testimony that he was angry and frightened upon being diagnosed with asbestosis, and that his fright was "magnified by the experience of his brother-in-law, who had physically wasted and died from asbestos-related cancer after his own diagnosis of asbestosis, was found to be a sufficient showing of emotional distress.

The court was expressly critical of the "notably thin" proof of emotional distress offered by the plaintiffs in *Ayers*:

> one of the claimants did not testify to having any concern about cancer; another testified that he was more afraid of shortness of breath from his asbestosis than of cancer. Others testified to varying degrees of concern over developing the disease; no claimant presented corroborative evidence of his fear.

*Ayers* at 1224, n. 18. The court stated that this proof "might well have succumbed to a straightforward sufficiency-of-the-

evidence objection,"[1] a which apparently was not raised inthe trial court. *Ayers* at 1224.

The Supreme Court's requirement of proof that the claimed emotional distress is "genuine and serious" follows a line of precedent requiring demonstrable evidence of emotional distress for pain and suffering damages resulting from violations of federal law. In *Carey v. Piphus*, 435 U.S. 247 (1978), the court specifically required evidence of "actual injury" as proof of emotional distress:[2]

> Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the *wrong and its effect on the plaintiff*....We use the term "distress" to include mental suffering or emotional anguish. Although

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[1] It is significant that the *Ayres* court, although rejecting an absolute requirement of physical manifestation of emotional distress, nonetheless noted that the absence of a physical manifestation might well render a plaintiff's proof insufficient for a significant recovery, thus suggesting that physical manifestation might be an element of the required "genuine and serious" showing, *Ayres* 123 at 1224, n. 17.

[2] *Carey* dealt with damages resulting from a deprivation of due process actionable under 42 U.S.C. § 1983. The approach has been followed in non-constitutional cases and the Fifth Circuit has held that "the Court's reasoning was not confined to § 1983" and that the Carey analysis is thus applicable to all cases involving federal claims for emotional harm." *Vadie v. Miss. State Univ.*, 218 F.3d 365, 376, n. 26 (5th Cir. 2000), quoting *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, n. 11 (5th Cir. 1996).

> essentially subjective, *genuine injury*[3] in this respect may be *evidenced by one's conduct and observed by others* ....

435 U.S. 247, 263-64 and n. 20 (emphasis added). As in FELA jurisprudence, the *Carey* court mandated an analysis rooted in tort common law rules "defining the elements of damages and the prerequisites for their recovery." 435 U.S. at 258-58. Following this lead, a number of circuit courts have devised tests for sufficiency of evidence of mental anguish claims which are entirely consistent with the *Ayers* court's "genuine and serious" requirement, and are enlightening as to the sufficiency of evidence necessary to prove"genuine and serious" fear.

The Eighth Circuit, moreover, has held that "any award for emotional distress must be supported, by competent evidence of a 'genuine injury,'" and that a plaintiff's testimony in this regard must "identify and describe the kind of severe emotional distress" worthy of compensation. *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999). The Eighth Circuit is consistent with the other circuits who require some objective evidence of emotional distress. *See e.g. Price v. Charlotte*, 93 F.3d 1241, 1251-1252 (4th Cir. 1996) ("evidence of the emotional distress must be demonstrable, genuine, and adequately explained"); *Patterson*, 90 F.3d 927, 939-940 (5th Cir. 1996)(denying emotional distress compensatory damages to a plaintiff who testified to frustration, loss of self-esteem, hurt, anger, and paranoia, but "presented no corroborating testimony [and did

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[3] Notably, the *Carey* court required proof of a "genuine injury"; the *Carey* court required proof that the claimed emotional distress is "genuine and serious."

not] offer expert medical or psychological evidence of damages caused by his alleged distress ... [nor any evidence of] sleeplessness, anxiety or depression...."); *Rakovich v. Wade*, 819 F.2d 1298, 1305 (7th Cir. 1990)(emphasis in original), *vacated en banc on other grounds*, 850 F.2d 1180, *cert. denied*, 488 U.S. 968 (1988) (requiring proof of "demonstrable emotional distress," greater than a plaintiff' s testimony that "just point[s] to circumstances of the [breach of duty] which might support an inference of such injury"); *Nekolav v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (emotional distress damage award reversed: a "single statement by a party that he was 'depressed', 'a little despondent', or even completely humiliated' ... is not enough to establish injury").

The analysis in these and other cases is entirely consistent with the *Ayers* "genuine and serious" requirement, as illustrated by the *Smith* and *Coffman* cases. *Compare, e.g., Knussman v, Maryland*, 272 F.3d 625, 640 (4th Cir. 2001)(plaintiff's and physician's testimony that he suffered chest pains, palpitations, depression, panic attacks sufficient to sustain "some award" for emotional distress); *Turie v. Holland Hospitality*, 85 F.3d 1211, 1215-16 (6th Cir. 1996) (plaintiff's testimony of nightmares, weight loss, and excessive nervousness sufficient to sustain damage award); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992) (testimony of insomnia, dizziness and vomiting sufficient to sustain damage award); *Vadie*, 218 F.3d 365, 377-78 (5th Cir. 2000) (plaintiff's testimony that he became "'sick, totally ill, physically, mentally, and everything ... [and] took many doctors, many pills" sufficient to sustain damage award); *with Forshee*. 178 F.3d at 531 (proof insufficient as a matter of law where plaintiff"suffered no physical injury, was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation

of emotional distress"); *Rodgers v. Fisher Body Div., Gen'l Motors Corp.*, 739 F.2d 1102 (6th Cir. 1984) (damage award reversed where plaintiff testified to no manifestations of alleged distress); and cases cited *supra*.

The Eighth Circuit, moreover, has denied recovery as a matter of law in federal emotional distress claims where there was insufficient evidence of mental anguish:

> An award of damages for emotional distress must be supported by competent evidence of "genuine injury." While a compensatory damage award may be based solely on plaintiffs own testimony, [the plaintiff's] testimony did not identify and describe the kind of severe emotional distress that warranted... award....[Plaintiff] suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress.

*Forshee*, 178 F.3d at 531. Tendered Instructions A-B set forth these requirements in a simple, brief and impartial matter and should have been given to the jury. It set forth each of the elements which must be present for an individual to recover for emotional distress due to fear of cancer in a straightforward common sense manner that could be understood by a jury composed of ordinary people. This is particularly true since the instructions submitted, particularly Instructions 7 and 9, allow the jury to assume that any expression of fear is an injury that is compensable in itself. By failing to give either of these instructions, the Court gave the jury absolutely no guidance on an issue that the United States Supreme Court has stated is a very complicated question. The Court's refusal to give these instructions severely prejudiced Union Pacific and requires a new trial.

2. Instructions C and 8.

The Court also erred in rejecting Union Pacific's Tendered Instruction C and giving Instruction No. 8 based upon MAI 32.07(B). Trial Tr. at 764, lines 7 - 17. Instruction C stated:

Instruction No. C

In your verdict you must access a percentage of fault to plaintiff whether or not defendant was partly at fault if you believe:

First, plaintiff continued to smoke after being advised by a physician to stop smoking, and,

Second, plaintiff was thereby negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

Instruction No. 8, which was give by the Court, stated:

Instruction No. 8

In your verdict you must access a percentage of fault to plaintiff whether or not defendant was partly at fault if you believe:

First, plaintiff continued to smoke after being advised by a physician to stop smoking, and,

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

The Court erred in giving Instruction No. 8 because paragraph three of MAI 32.07(B) misstates the applicable causation standard under the FELA. The approved version of MAI 32.07(B) states a causation standard of "directly contributed to cause" while the approved version of MAI 24.01, which was given by the Court, states a causation standard of "contributed in whole or in part." The FELA imposes a pure comparative fault system, with the same standard of causation governing both the defendant's and the plaintiffs fault. *See* 45 U.S.C. §§ 51 and 53; *Fashauer v. New Jersey Transit Rail Operations*, Inc., 57 F.3d 1269, 1282-83 (3d Cir. 1995); *Gavagan v. United States*, 955 F.2d *1016,* 1019 n.7 (5th Cir. 1992) ("[T]he same general negligence.., and causation standards apply to both employer and employee in Federal Employers' Liability Act...cases."). Thus, Instruction No. 8 and MAI 32.07(B) misstate the law by imposing a much higher standard of causation ("directly contributed") upon the defendant than the standard imposed upon the plaintiff in Instruction No. 7 and MAI 24.01 ("contributed in whole or in part"). The Court's submission of Instruction No. 8, instead of Instruction C, severely prejudiced Union Pacific and misstated the law. Accordingly, Union Pacific is entitled to a new trial.

3. Instructions D and E.

The Court also erred in rejecting Union Pacific's Tendered Instructions D regarding mitigation of damages. Trial Tr. at 764, lines 18-23. Instructions D and E stated:

Instruction D

If you find in favor of plaintiff, you must find plaintiff failed to mitigate damages if you believe:

First, plaintiff continued to smoke cigarettes after the diagnosis of his alleged condition,

Second, plaintiff thereby failed to use ordinary care, and

Third, plaintiff thereby sustained damage which would not have occurred otherwise.

Instruction E

If you find plaintiff failed to mitigate damages as submitted in Instruction Number D, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure.

"Under federal law an employee has a duty to mitigate damages" *Hawkes III v. Norfolk & Western Railway Company*, 876 S.W.2d 705, 706 (Mo. App. 1994). A "plaintiff's failure to mitigate damages is an affirmative defense which must be pleaded and proved by defendant, and defendant is entitled to a separate instruction on mitigation of damages if supported by substantial evidence." MAI 32.07(A), Committee Comment (1996 New)(citing *Kauzlarich v. Atchison, Topeka and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995). Union Pacific asserted affirmative defenses based upon failure to mitigate damages. *See* Answer, Am. Answer. Plaintiff, moreover, continued to smoke after purportedly being diagnosed with asbestosis. Trial Tr. at 209, lines 20-22. Just like a FELA plaintiff has a duty to mitigate damages by returning to gainful employment, a FELA plaintiff seeking damages for emotional distress for fear of cancer has a duty to lessen or mitigate that fear and, ultimately, the chances of developing cancer by refraining

from those activities which may increase that individual's likelihood of developing cancer. Thus, a mitigation of damages instruction was appropriate in this case. *Kauzlarich*, 910 S.W.2d at 258. Accordingly, Union Pacific is entitled to a new trial

4. Instruction F.

Instruction F, the withdrawal instruction, also should have been given. Trial Tr. at 764, line 24 - 765, line 3. The Court granted Union Pacific's Motion in Limine to exclude any evidence or testimony regarding lost wages and reduced earning capacity. *See* Def. Union Pacific Railroad Company's Mot. in Limine regarding Lost Wages, Reduced Earning Capacity and Pain and Suffering. Instruction F stated:

Instruction No. F

> The issues of the plaintiff's past loss of wages and benefits and future loss of wages and benefits are withdrawn from the ease and you are not to consider such issues in arriving at your verdict.

Plaintiff presented no real evidence of past or future lost wages or reduced earning capacity. However, Plaintiff testified that he hoped to work five (5) more years, until age 60 "God willing," Trial Tr. at 185, lines 18-21.

"Withdrawal instructions should be given when there is evidence, which might mislead the jury in its consideration of the case as pleaded and submitted." *Arnold v. Ingersoll-Rand Company*, 908 S.W.2d 757, 764 (Mo. App. 1995), "Where there is evidence in the case which might raise a false issue, it is reversible error for the trial court to fail to give an instruction withdrawing such evidence from the jury's

consideration." *Harris v. Washington*, 654 S.W.2d 303, 307 (Mo. App. 1983). In *Dillard v. Atchison, Topeka and Santa Fe Railway Company*, the Court held in a FELA action that the trial court committed reversible error in failing to give a withdrawal instruction where there was no evidence of future loss of wages. 882 S.W.2d 211, 214 (Mo. App. 1994). In this matter, the Court's failure to give Instruction F prejudiced Union Pacific because his testimony that he hoped to work until age 60 "God willing," left the jury with the false impression that Plaintiff may not be able to work until age 60 because of his purported asbestos and sought damages for lost wages and reduced earning capacity, even though Plaintiff presented no evidence of such damages and the Court granted Union Pacific's motion in limine on this issue. *See Harris*, 654 S.W.2d at 307; *Dillard*, 882 S.W.2d at 214.

5. Conclusion.

Based on the foregoing, The Court should order a new trial based upon these instructional errors. *Sam Snead School of Golf v. Anchor Casualty Company*, 386 S.W.2d 412, 416 (Mo. 1965); *Mal Spinrad of St. Louis, Inc. v. Karman, Inc.*, 690 S.W.2d 460, 465 (Mo. App. 1985); *Kauzlarich*, 910 S.W.2d at 258; *Harris*, 654 S.W.2d at 307; *Dillard*, 882 S.W.2d at 214.

**C. The Admission of Testimony concerning the findings of Richard B. Levine, M.D. and M. Sundarem, M.D. Unduly Prejudiced Union Pacific and Union Pacific should have been allowed to argue an Adverse Inference based upon their Failure to Testify**

Throughout the trial of this matter, Plaintiff and his medical expert, Dr. Jill Ohar, referred to conclusions reached

by Richard B. Levine, M.D. and M. Sundarem, M.D. Both Dr. Levine and Dr. Sundarem are purportedly B-Readers or individuals with specialized training to score abnormalities on chest films that are related to industrial exposure. These alleged experts were engaged by Plaintiff's counsel for purposes of this litigation. Union Pacific, therefore, could not contact either Dr. Levine and Dr. Sundarem to inquire as their opinions and conclusions concerning Plaintiff's alleged condition nor the basis there of prior to the production of these witnesses for a deposition by Plaintiff. *See* Missouri Supreme Court Rule 56.01(b)(4)(b). Plaintiff, however, never produced either Dr. Levine or Dr. Sundarem for a deposition in this matter despite Union Pacific's repeated requests to depose them. *See* Def. Union Pacific Railroad Company's Mot. in Limine to Exclude the Trial Test. of Any Expert Witness Offered by Pl. other than Jill Ohar, M.D. and to Strike the Expert Reports of Richard B. Levine and M. Sundarem, M.D. The Court, moreover, denied Union Pacific's request to bar references to these individuals. *Id.*

Settled Missouri case law supports the exclusion of expert witnesses who have not been produced for a deposition prior to trial. *See Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648-50 (Mo. banc 1997); *Goede v. Aerojet General Corporation* 143 S.W.3d 14, 23-24 (Mo. App. E.D. 2004); *Ellis v. Union Electric Company*, 729 S.W.2d 71, 75-76 (Mo. App. E.D. 1987); *Koonee v. Union Electric Company*, 831 S.W.2d 702, 704 (Mo. App. E.D. 1992). In *Ellis v. Union Electric Company*, the Missouri Court of Appeals for the Eastern District noted that "[c]ompetent trial preparation requires identification of an adverse party's expert in sufficient time before trial to allow for investigation of the qualifications of the proposed expert, his opinions, conclusions and the basis therefor...[and] his relationship with the parties or their attorneys... among other matters," 729 S.W.2d at 75. The

logical outgrowth of these decisions is that references to other expert witnesses and their conclusions should be also excluded from evidence at trial where the adverse party does not have an opportunity to inquire into the reasons for the expert's opinions and conclusions.

Here, Plaintiff referred to the finding of these individuals numerous times during the course of trial and admitted both reports into evidence. Trial Tr. at 85, lines 17-19, 242, lines 36, 494, lines 17-25, 495, 1-10, 605, lines 13-23, 606, lines 10-14 — 22-24, 759, lines 21-23, 760, lines 7-15, 779, lines 17-21, 806, lines 20-23; 2/8/05 Videotaped Dep. of Jill Ohar, M.D. at 15, line 25-16, line 19, 17, lines 2-7, 34, lines 1-8, 41, lines 10-14. Plaintiff's repeated references to Dr. Levine's and Dr. Sundarem's diagnosis of asbestosis in Plaintiff prejudiced Union Pacific by implying to the jury that they were qualified to render the opinions set forth in their reports and that their conclusions were otherwise competent and reliable. In fact, Union Pacific never had an opportunity to cross-examine either physician on their qualifications or opinions. This testimony, therefore, should have been excluded. *Hawley* 452 S.W.2d at 609, 612; *Rogers* 522 S.W.2d at 639.

In the alternative, Union Pacific should have been allowed to argue an adverse inference based upon their failure to appear. Union Pacific, in closing, argued that the jury had heard the names of "two other doctors... a Doctor Levine,... and a Dr. Sundarem ... but you hadn't heard them walk up here --." Trial Tr. at 796, lines 6-14. The Court sustained Plaintiff's objection on the ground that it was an improper adverse inference argument. *Id.* at 796, lines 12-15. "[C]ounsel is given wide latitude to suggest inferences from evidence on closing argument." *Moore v. Missouri Pacific Railroad Company*, 825 S.W.2d 839, 844 (Mo. banc 1992).

"Where a witness is not equally available to both parties, it is prejudicial error for the trial court to prevent the party to whom the witness is not equally available from requesting the jury to draw an adverse inference from the failure of the opposing party to produce the witness." *Piper v. Union Pacific Railroad Company*, 847 S.W.2d 907, 910 (Mo. App. 1993). In *Piper*, the Missouri Court of Appeals held that it was error to deny Missouri Pacific the opportunity to invoke the adverse inference rule as to a plaintiff's treating physician who initially diagnosed his heating loss, even though his records were before the jury. *Id.* at 911.

Neither Dr. Levine or Dr. Sundarem were available to Union Pacific until produced by Plaintiff. There is always risk of making tactical decisions about trying a lawsuit. By failing to produce these experts for deposition and failing to bring them to trial, plaintiff ran the risk of hearing an adverse inference argument. That is fair and the Court's refusal to allow Union Pacific to make that argument simply was not. Accordingly, Union Pacific should have been allowed to invoke the adverse inference rule in its closing, as in *Piper*, based upon Plaintiff's failure to produce for deposition either of these physicians. *Id.*

A new trial, therefore, must be granted because Union Pacific was prejudiced by the references to and admissions into evidence of the reports of Drs. Levine and Sundarem and should have been able to invoke the adverse inference rule in its closing. *Hawley*, 452 S.W.2d at 609, 612; *Rogers*, 522 S.W.2d at 639; *Piper*, 847 S.W.2d at 911.

**D. Union Pacific was prejudiced by the Omission of References to Medication taken by Plaintiff for Depression**

Union Pacific was also prejudiced by the omissions and references to antidepressant medications taken by plaintiff prior to his diagnosis of asbestosis. At trial Union Pacific attempted to offer portions of Dr. Carmichael's deposition concerning Plaintiff's use of antidepressant medications into evidence. Trial Tr. at 336, line 5-337, line 15. *See* 11/9/04 Deposition of Kim Carmichael, M.D. at 16, lines 12-20 attached hereto as Exhibit B and incorporated herein by reference. "All facts and circumstances which are relevant to the issues of the case are admissible, unless their exclusion is required by some established principle of evidence." *McFadden v. McFadden*, 509 S.W.2d 795, 7981 (Mo. App. 1974). "Evidence is relevant if it tends to prove or disprove a fact in issue or if it tends to corroborate evidence which is relevant and which bears on the principal issues." *Reed v. Rope*, 817 S.W.2d 503, 510 (Mo. App. 1991). Here, testimony concerning Plaintiff's taking of antidepressants was clearly relevant as he placed his mental health status at issue by seeking damages for emotional distress based upon fear of cancer and mentioned these problems in his opening statement and testimony. Trial Tr. at 102, lines 7-8, 198, line 24-199, line 7, 204, lines 7-19, 225, lines 8-10, 226, line 6, 227, line 111, 228, lines 21-23. Any testimony concerning Plaintiff's current mental health problems was relevant to show that Plaintiff's purported emotional distress damages were caused by other factors, potentially prior to his asbestosis diagnosis. Union Pacific was severely prejudiced by the exclusion of this evidence because it did not have the opportunity to argue alternative causes of Plaintiff's purported damages to the jury. *See Overtrop v. Bi-State Redevelopment Corp.*, 521 S.W.2d 488, 492 (Mo. App. 1975); *Yerington v. La-Z-Boy Inc.*, 124

S.W.3d. 517, 522-23 (Mo. App. 2004). Accordingly, the Court should grant a new trial based upon the exclusion of this testimony. *Id.*

**E. Error in limiting testimony regarding inspection of the building located at 210 N. 13th Street**

The Court also erred by excluding any testimony by Union Pacific's industrial hygiene experts, Larry Liukonen and Frank Weir, Ph.D., regarding their opinions following their inspection of the St. Louis office building other than that their previous opinions had not changed. Trial Tr. at 339, line 4-342, line 11. Although Mr. Liukonen and Dr. Weir were entitled to testify that their opinions had not changed since their inspection, they should have been entitled to offer specific testimony concerning their observations during the inspection. This evidence is clearly relevant as "it tends to prove or disprove a fact in issue or tends to corroborate evidence which is relevant and bears on the principal issue." *Reed*, 817 S.W.2d at 510. Mr. Liukonen and Dr. Weir's opinions derived from their inspection of the building certainly fall within this category as it addresses the unfettered lay testimony offered by Plaintiff and his co-workers concerning the presence of asbestos-containing materials in this building. The exclusion of this testimony prejudiced Union Pacific by depriving it of an opportunity to disprove the unfounded prejudicial testimony offered by Plaintiff's lay witnesses. Accordingly, because Union Pacific was prejudiced by the exclusion of this expert testimony, it is entitled to a new trial. *See Overtrop*, 521 S.W.2d at 492; *Yerington*, 124 S.W.3d at 522-23.

**F. Plaintiff's Questions regarding the knowledge of "Railroad Doctors" in 1935**

It was plain error such that Union Pacific is entitled to a new trial, for Plaintiff to question Dr. Frank Weir, Union Pacific's industrial hygiene expert, regarding the knowledge of railroad doctors in 1935. In accordance with leading FELA case law, a plaintiff must establish as a foundation either that Union Pacific had actual knowledge of the contents of such medical and scientific state-of-the-art evidence, or, as a member of the railroad industry, can reasonably be deemed to have had constructive knowledge of such evidence before or during the Plaintiff's railroad employment, before such evidence can come in. *See CONRAIL v. Gottshall,* 512 U.S. 532 (1994); *Gallick v. Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963); *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998); *Bagley v. CSX Transp. Inc.*, 465 S.E.2d 706 (Ga. App. 1995). In questioning Dr. Weir regarding what "railroad doctors" knew in 1935 concerning pneumoconiosis, Plaintiff did not establish that Union Pacific or its physicians had such knowledge. Trial Tr. at 752, line 2-754, line 4. This prejudiced Union Pacific by implying that it had knowledge of asbestosis as early as 1935 without any evidence of such knowledge. The Court, therefore, must grant Union Pacific a new trial because of this error.

**G. The Court Erred in allowing Plaintiff to Introduce the Deposition of Dr. Herbert Shapiro in his case**

In Missouri, "[a]s a general rule the introduction of a deposition or a part thereof by a party for any purpose other than contradiction or impeachment makes the deponent the witness of the party introducing it." *Eickmann v. St. Louis Public Service Company*, 323 S.W.2d 802 (Mo. 1959). Union

Pacific took Dr. Shapiro's deposition for use at trial. 3/28/05 Videotaped Deposition of Herbert Shapiro, M.D. at 5, line 19-22 attached hereto as Exhibit C and incorporated herein by reference. The Court should not have allowed Plaintiff to play Plaintiff's cross-examination in his case because it allowed Plaintiff's counsel to ask leading questions in violation of basic rules of evidence while at the same time transforming Dr. Shapiro from Union Pacific's witness to Plaintiff's witness.

**H. The Court should Order a New Trial because the Verdict is Against the Weight of the Evidence or, in the alternative, a Substantial Remittitur**

Missouri Rule of Civil Procedure 78.02 provides that a court may order a new trial where the verdict is against the weight of the evidence. *See Carpenter v. Chrysler Corporation*, 853 S.W.2d 346, 359 (Mo. App. 1993).

The Eastern District of the Missouri Court of Appeals recently addressed a case where it defined the circumstances that either justify or require a newtrial or remittitur. In *Ince v. Money's Bldg & Development*, 135 S.W.3d 475, 478-79 (Mo. App, E.D. 2004), the court distinguished between verdicts considered "grossly excessive" and those that are "merely excessive":

> A jury's verdict for an amount not supported by the evidence can be either grossly excessive or merely excessive. A grossly exeessive verdict indicates bias and prejudice on the part of the jury, and ***requires*** a new trial to be ordered. In contrast, a merely excessive verdict occurs when a jury made an honest mistake in weighing the evidence as to the nature and extent of the injury, in fixing the damages, and in

> subsequently awarding a disproportionate amount of money. Such a mistake can be corrected without a new trial by requiring a remittitur of a portion of the amount awarded.

*Id.* at 135 S.W.3d at 478 (emphasis added). Thus, according to the *Ince* decision, a grossly excessive verdict requires a new trial and a "merely excessive" verdict can be corrected by a remittitur. *Id.*

Union Pacific respectfully submits that the jury's $300,000,00 verdict was grossly excessive, even when reduced by Plaintiff's 20% comparative fault. The only evidence of damages offered by Plaintiff were emotional distress damages based upon his alleged fear of developing cancer. The Court erroneously denied Union Pacific's Motion in Limine on this issue. Plaintiff has not suffered lost wages or incurred medieal expenses. Evidence of damages for pain and suffering was non-existent and should have been excluded despite the Court's erroneous ruling on Union Pacific's motion in limine regarding this issue.

As set forth above, claims for emotional distress damages for fear of cancer have very specific proof requirements set forth by the United States Supreme Court. Plaintiff did not identify or describe any kind of emotional distress at all. He produced no evidence that he suffered physical injury. He admitted that he was not medically treated for any psychological or emotional injury. No other witness corroborated any outward manifestation of emotional distress: in fact, Dr. Shapiro testified that Plaintiff was "stoic" when he learned that he had sarcoma, a cancer completely unrelated to asbestos exposure. 3/28/05 Deposition of Dr. Herbert Shapiro at 13, lines 14-19, 14, lines 10-19, 18, line 21-19, line 1, 21, line 11-22, line 1, 24, lines 2,11, Exhibit C.

Plaintiff's testimony that he "worries" about developing asbestos-related cancer, standing alone, is utterly insufficient for an award of emotional distress damages as contemplated by *Ayers*. Indeed, the *Ayers* court cited with approval the case of *Smith v. A. C. & S., Inc.*, 843 F.2d 854, 859 (5th Cir. 1988), quoting the holding of the case as stating "general concern for [one's] future health" is held insufficient to support recovery for an asbestosis sufferer's fear of cancer." Plaintiff testified to no more than a "general concern."

No one will ever know exactly how the jury arrived at its $300,000.00 verdict. The most logical explanation is that the jury heard the testimony about the unsubstantiated exposures to asbestos Plaintiff purportedly endured and decided to compensate Plaintiff with a gross mount of money for his "general concerns" about his future health. Plaintiffs' damages, however, should be limited to the risks associated with the purported asbestos exposure, exclusive of those risks associated with cigarette smoking. *See Dafler v. Raymark Industries, Inc.*, 259 N.J.Super. 17, 35, 611 A.2d 136, 145-46 (1992); *Brisboy v. Fibreboard Corporation*, 429 Mich. 540, 552, 418 N.W.2d 650, 655 (1988). Dr. Bernard Gee testified that Plaintiffs risk of developing cancer increased exponentially because he was a smoker. Trial Tr. at 476, lines 7-13. Union Pacific should not be liable for these damages and the Court should have instructed it as such and erroneously denied Union Pacific's motion in limine on the synergistic effect of smoking. Regardless of the reason, a $300,000.00 verdict, even reduced to $240,000.00 is grossly excessive. This grossly excessive verdict requires a new trial. This Court has the discretion and should exercise it to order a new trial because the damages assessed were not based upon the evidence.

If the Court does not order a new trial, it should remit the verdict substantially. In applying the remittitur statutes courts look to a number of factors: (1) loss of income, both present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of plaintiff's injuries; (5) economic considerations; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to evaluate plaintiffs injuries and other damages. *Othman v. Wal-Mart Stores, Inc.*, 91 S.W.3d 684, 687 (Mo. App. E.D. 2002). Ultimately, the test for remittitur is determining an amount to fairly and reasonably compensate the plaintiff for the injuries sustained. *Id.*

Five of the factors stated above strongly suggest a substantial remittitur. The first factor is loss of income. Plaintiff has not submitted any evidence of lost income- present or future. He plans to continue working for Union Pacific until age 60. Trial Tr. at 185, lines 18-21. The second factor is medical expenses - Plaintiff had none. Plaintiff's age of 55 is not really important; many plaintiffs are younger or older. The nature and extent of Plaintiff's injuries are simply not the type of injuries that support a $300,000.00 verdict. He still goes to work everyday and, more importantly, he works out- rigorously by his own admission, an average of five (5) days per week. Trial Tr. at 205, lines 8-10, 206, lines 3-11. Plaintiff also testified to no more than a "general concern" about the possibility of developing cancer.

The sixth factor, awards given and approved in comparable cases, is not the sole test for remittitur, however, it certainly favors one. *Hatch v. V.P. Fair Foundation*, 990 S.W.2d 126, 141 (Mo. App. 1999). Recently, in *Quarles v. Advocate Mines, Ltd.*, a jury awarded $50,000.00 for fear of cancer to an insulator who claimed he suffered from asbestosis and pleural disease. *See* 6 Trials Digest 8th 1, 2005

WL 288657 (Cal. Superior 2005). The fact that this case involves a plaintiff with no significant industrial exposures cries out for a substantial remittitur.

Based on the foregoing, the verdict is against the weight of the evidence, or at the very least, excessive in light of the evidence, and a new trial and/or substantial remittitur should be ordered.

## CONCLUSION

For the reasons stated herein, the Court must grant a new trial, or in the alternative, a substantial remittitur.

Respectfully submitted,

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Union Pacific Railroad Company

**EXHIBIT A**

**IN THE CIRCUIT COURT OF MISSOURI OF THE CITY OF ST. LOUIS STATE OF MISSOURI**

**Cause No. 022-337**
**Division No. 11**

**[Taken February 8, 2005]**

| | |
|---|---|
| Timothy P. Hedgecorth, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Union Pacific Railroad Company, | ) |
| Defendant. | ) |
| | ) |

**The Videotaped Deposition of JILL OHAR, M.D.**
**taken by Counsel for the Defendant**
**Winston-Salem, North Carolina**
**February 8, 2005**

Reported by: Stephanie Fischer
Court Reporter
Notary Public
State of North Carolina

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A. I don't know why the CT scans were done, but I think that could be a safe assumption.

Q. The cancer that he's been diagnosed with already has nothing to do with asbestos, does it?

A. That's correct.

Q. Just -- I'm going to go back into something that we talked about, but I just want to clarify.

As to any of the claimed exposures that Mr. Hedgecorth has, you have no independent facts to confirm or refute any of those exposures?

MR. HAGERTY: Object. Asked and answered.

A. I didn't go to work with him those days, no. And that would be the only way I could independently --

BY MR. COWAN:

Q. And you don't know the content of any of the dust that he would complain about on his desk?

A. No, sir. I would have to rely on an industrial hygienist to do that.

Q. And if there were air-quality reports prepared by Union Pacific assessing the air quality of the building, would that be of any significance to you? Or would it not matter to you since it's not really your background anyway?

A. Number 1, it's not my background but, Number 2, if the air quality wasn't where he was sitting, I don't think it has a lot relevance to the patient.

* * * * *

**EXHIBIT B**

**IN THE CIRCUIT COURT**
**TWENTY-SECOND JUDICIAL CIRCUIT**
**ST. LOUIS CITY**

**[Taken November 9, 2004]**

| | |
|---|---|
| Ron Goacher, James Devereaux Timothy P. Hedgecorth, Plaintiffs, | ) |
| v. | ) |
| Union Pacific Railroad Company, Defendant. | ) |

**Deposition of DR. KIM CARMICHAEL**
**November 9, 2004**

TINA M. STUMPF, RPR, CSR
ILLINOIS CSR # 084-003469
GORE, PERRY, GATEWAY & LIPA REPORTING COMPANY
515 OLIVE STREET, SUITE 700
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(314) 241-6750 1-800-878-6750

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takes Lozol, which is a diuretic which helps to decrease his calcium excretion in his urine; and he also takes other medication, a citrate type of medication to keep him from

forming kidney stones. He takes a potassium pill because you lose potassium with the dieretic. He takes Allopurinol, which is a medicine that lowers the uric acid. That also helps to treat his kidney stones. He has taken Paxil and Alprazolam, which are two medications that he's taking for some chronic mild depression and they seem to help pretty well.

Q Is he still on some type of antidepressant medication?

A To my best recollection, but not having that record in front of me right now, I can't say for absolutely sure, but I'm quite sure he is. And he also takes a medication for erectile dysfunction. He's tried Viagra and Levitra and Cialis; and whichever one he's taking now, I don't immediately recall, but he's taking that.

Q I noticed references in the medical to sinus problems or rhinitis?

A Uh-huh.

Q Is he currently, or at least as far back as the medical records go, taking any types of

* * * * *

## EXHIBIT C

**[Taken March 28, 2005]**

| | |
|---|---|
| Timothy P. Hedgecorth, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Union Pacific Railroad Company, | ) |
| Defendant. | ) |
| | ) |

**Deposition of DR. HERBERT SHARIPO**

**March 28, 2005**

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cancerous?

A Sarcoma means cancer, yes.

Q So Mr. Hedgecorth, in effect, was diagnosed with some type of cancer at that time?

A That's correct.

Q Okay. Do you recall how long after you received the pathology when you met with Mr. Hedgecorth and informed him of the diagnosis?

A Well, the surgery was done on the 13th of May. For reasons which I am not clear at this point he didn't return

until June 26th, at which time I had the conversation with him regarding the diagnosis.

Q When you indicated to Mr. Hedgecorth that the results indicated the mass was cancerous, what was his reaction?

A Well, I have to say that Mr. Hedgecorth, throughout the course of treatment from beginning to end, was rather -- I would say rather stoic. He accepted the diagnosis and the recommended treatment without any great emotional response that I can recall. He said, Yes, okay, fine, we'll do it, that type of response, and then went ahead and did it.

Q Is there anything about this particular cancer that -- let me rephrase this. Is this the type of cancer -- the type of cancer that Mr. Hedgecorth was diagnosed with, is that the type of cancer that can metastasize and spread to other portions of a person's body?

A Absolutely.

Q Okay. Did you explain that to Mr. Hedgecorth?

A Yes.

Q Okay. And, again, would your characterization of his reaction be the same when you explained that possibility to him?

A Well, don't forget, it's been a while since I've seen him, recall every bit -- my overall impression of Mr. Hedgecorth's response to his circumstances and to my recommendations were one of stoicism, of acceptance, and certainly there was no great anguish or angst or crying out or whatever about his diagnosis.

Q And what was the planned course of treatment to treat the cancer that had been diagnosed?

A Well, the -- initially the tumor, when it recurred, wasn't known for a cancer. As a matter of fact, it took quite a bit of pathological

* * * * *

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obviously I didn't give it to him so I didn't discuss how it was going to be administered. I was one who recommended that once his wound is healed that he should proceed on with radiation therapy.

Q So you recommended it as a further course of treatment?

A Yes. Yes.

Q When you recommended this to Mr. Hedgecorth, did he ever indicate that he was concerned that radiation therapy may -- let me rephrase this. When you recommended to Mr. Hedgecorth that he undergo radiation therapy, did he ever indicate to you that he had been diagnosed with asbestosis and was concerned that the radiation therapy could somehow exacerbate what he alleges is his condition?

A Again, I have -- I have-- he may have mentioned it. I have no recollection and as far as I know, I did not record that in my records, so the answer is no.

Q So, did he have any concerns whatsoever about undergoing radiation therapy?

A I do not believe so. As I said, I think that he managed the whole thing in a rather stoic fashion without explaining too much about anything else.

Q Okay. Can we mark this as Exhibit B? It's previously been marked as Hedgecorth 000575 through 577. I have another one around here, but -- here it is.

MR. HAGERTY: Thank you.

(Defendant's Deposition Exhibit B marked for identification.)

Q (By Ms. Volkman) The document that I've just handed you, was that signed by you, Dr. Shapiro?

A Yes, it is.

Q And could you identify that document for me?

A This is a history and physical written out by the surgical resident at the time. And I simply put my approving signature on it.

Q With regard to Mr. Hedgecorth's--and let me back up a second. This was -- is dated on June 27, 2003, correct?

A That's correct.

Q And that was the day of Mr. Hedgecorth's re-excision?

A That's correct.

Q Okay. And with regard to his mental state

* * * * *

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exams.

Q So over the course of the next almost eight or ten months, you saw him five more times, would that be correct?

A That's correct.

Q Okay. And during those visits, did Mr. Hedgecorth have any concerns about his -- the way his treatment was progressing?

A No, his behavior was consistent with what I've already said.

Q Did he ever indicate to you during those visits or any prior visits that he had fears or concerns about his condition getting worse?

A You mean the tumor condition or --

Q His overall health, the tumor spreading.

A That's not the kind of thing I necessarily would put in my medical records. I tend to stay focused on the surgical status and that wasn't recorded in my records. But, again, I will say Mr. Hedgecorth's behavior was rather stoic. I mean, I'm not going to say that Mr. Hedgecorth was not upset. I'm just saying how he outwardly appeared when he was in the office.

Q There was no expression of being upset to you, is that correct?

A No, no.

Q Did he ever indicate that he was losing sleep or suffering from insomnia because he was concerned about the myxofibroma diagnosis?

A Again, I don't have any recollection of that. He may have said that. It's the kind of thing I probably would not have necessarily recorded in my records.

Q But to the best of your recollection?

A To the best of my knowledge I don't have any recollection that he said that.

Q Did he ever indicate that he was losing weight because he was concerned about the cancer spreading or getting worse?

A I have no recollection of that either

Q Do you have any recollection of him stating to you that he would -- was becoming physically ill, perhaps having nausea or cold sweats because he had concerns about his cancer diagnosis and reoccurrence or spreading of the disease?

A I have no recollection of that either.

Q Do you have any recollection that he suffered from any type of stress related condition because of concerns about his cancer diagnosis of the -

* * * * *

[Page 24]

A His partner, but I don't remember his name.

Q Okay. After the excision in June of '03, was it possible that a mass or tumor could grow back? Is there a possibility of reoccurrence?

A Oh, absolutely.

Q And you talked to Mr. Hedgecorth about that?

A Yes.

Q Okay. And, again, would you describe his reaction as being stoic?

A Yes, I would.

Q Okay. Do you have any reason to believe that Mr. Hedgecorth's – the myxofibroma, that cancer was in any way related to asbestos exposure?

A I do not have any reason to believe that it is related to it.

Q Okay. What causes this type of cancer?

A I don't know. I don't think anybody has an answer for that.

Q Could the prior lesions that he had on the back and the buttocks which were removed in '02, could those have been, in your opinion, caused by asbestos exposure?

A No.

Q Looking at your records that we received,

* * * * *

## APPENDIX E

**MISSOURI CIRCUIT COURT**
**TWENTY-SECOND JUDICIAL CIRCUIT**
**(ST. LOUIS CITY)**

**Cause No. 022-337**
**Division No. 11**

**[Filed April 19, 2005]**

| | |
|---|---|
| Timothy P. Hedgecorth, Plaintiff, | ) |
| v. | ) |
| Union Pacific Railroad Company, Defendant. | ) |

**JUDGMENT**

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

VERDICT_____

Whereas, on the claim of Timothy Hedgecorth for personal injuries, against Union Pacific R. Co., [the Jury

found in favor of the (Plaintiff), (Defendant)] (and/or) [the Jury assessed the percentages of fault as follows:]

| | |
|---|---|
| Defendant UPR. Co. | 80% |
| Plaintiff Timothy Hedgecorth | 20% |
| | 100% |

The Jury found the total damages of (Plaintiff), (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be $300,000 Dollars and 00 Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff Timothy Hedgecorth have and recover of:

Union Pacific R. Co. $240,000

[Cost of this action to be taxed against the (Plaintiff(s)), (Defendant(s))] or [Cost waived].

/s/Patrick Hagerty 32991
Attorney for Plaintiff, Bar#

701 Market Ste 800
Address

314-241-5670
Phone #

/s/Tracy J. Cowan #40229
Attorney for Defendant, Bar#

1 U.S. Bank Plaza
Address

314-552-6138
Phone #

SO ORDERED:

/s/Mark H. Neill

Judge, Division No. 11

Judge No. 24138

## APPENDIX F

VERDICT_____

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff Timothy Hedgecorth for personal injury, the we, the undersigned jurors, assess percentages of fault as follows:

| | |
|---|---|
| Defendant Union Pacific Railroad Company | 80% (zero to 100%) |
| Plaintiff Timothy Hedgecorth | 20% (zero to 100%) |
| TOTAL | 100% (zero OR 100%) |

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages, disregarding any fault on the part of plaintiff to be $ 300,000 (stating the amount).

Note: All jurors who agree to the above must sign below.

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ _____

/s/ _____ _____

## APPENDIX G

Instruction Number 7

In your verdict you must assess a percentage of fault to defendant whether or not plaintiff was partly at fault if you believe:

First, defendant failed to provide reasonably safe conditions for work, and

Second, defendant was thereby negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

MAI 24.01 (modified by 37.01)

Offered by Plaintiff

## APPENDIX H

Instruction Number 9

If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in evidence. You must state such total amount of plaintiffs damages in your verdict.

In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiffs total damages by any percentage you assess to plaintiff. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income taxes.

MAI 37.03 (modified by 8.02)

Submitted by Defendant

## APPENDIX I

Instruction Number A

In determining whether plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. In order to award damages to plaintiff for any emotional distress, you must be persuaded, by a preponderance of the evidence, that his emotional distress is an actual injury.

In making this determination, you may take into account whether or not plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

Unless you determine that their fear is genuine and serious, and he has suffered actual emotional injury as a result of this fear, you cannot find for the Plaintiffs.

Non-MAI

*See Norfolk & W. Ry Co. v. Ayers*, 123 S.Ct. 1210 (2003); *Carey v. Piphus*, 435 U.S. 247 (1978); *Smith v. ACandS, Inc.*, 843 F.2d 854, 859 (5th Cir: 1988); *Vadie v. Miss. State*

*Univ.*, 218 F.3d 365, 376, n. 26 (5th Cir. 2000); *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999); *Price v. Charlotte*, 93 F.3d 1241, 1251-52 (4th Cir. 1996); *Turie v. Holland Hospitality*, 85 F.3d 1211, 1215-16 (6th Cir. 1996); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1305 (7th cir. 1990); *Coffman v. Keene Corporation*, 257 N.J.Super. 279, 608 A.2d 416 (1992).

Submitted by Defendant

Rejected MHM 4-19-05

## APPENDIX J

Instruction No. B

In order to find in favor of plaintiff for emotional distress resulting from any reasonabl fear of developing cancer as a result of asbestosis, you must believe:

First, plaintiff suffers actual emotional injury as a result of his fear of cancer relating to asbestosis; and

Second, plaintiff has taken actions indicating more than a general concern about his future health or has demonstrated physical symptoms as a result of his fear of cancer.

Non-MAI

*See Mehrer v. Diagnostic Imaging Center, P.C.*, 157 S.W.3d 315, 323 (Mo. App. 2005); *McMullin v. Borgers,* 806 S.W.2d 724, 730 (Mo. App. 1991); *Norfolk & W. Ry Co. v. Ayers*, 123 S.Ct. 1210 (2003); *Carey v. Piphus*, 435 U.S. 247 (1978); *Smith v. ACandS, Inc.*, 843 F.2d 854, 859 (5th Cir. 1988); *Vadie v. Miss. State Univ.*, 218 F.3d 365, 376, n. 26 (5th Cir. 2000); *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531 (8th Cir. 1999); *Price v. Charlotte*, 93 F.3d 1241, 1251-52 (4th Cir. 1996); *Turic v. Holland Hospitality*, 85 F.3d 1211, 1215-16 (6th Cir. 1996); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1305 (7th Cir. 1990); *Coffman v. Keene Corporation*, 257 N.J.Super. 279, 608 A.2d 416 (1992).

Submitted by Defendant

Rejected MHM 4-19-05

## APPENDIX K

### Trial Transcript Excerpts

| | |
|---|---|
| Timothy P. Hedgecorth, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Union Pacific Railroad Company, | ) |
| Defendant. | ) |
| | ) |

**Trial Transcript of April 11, 2005**
**Cause No. 022-337**

**Margaret R. Cole, Certified Court Reporter**

[Page 762]

MR. COWAN: Judge, were you also going to put the refused instructions on the record?

THE COURT: I apologize. I will do that while Pat is looking at that. We have instructions A through F submitted by defendant. Those have been rejected by the Court. If the defendant wishes to put anything else on the record regarding those instructions, by all means, please do so at this time.

MR. COWAN: Your Honor, Instructions both A and B relate to the *Ayres* decision and the concept that there has to be some guidance to the jury as to what an award for fear of cancer from emotional distress would be. Based upon the *Ayres* decision it makes it clear that not just any general concern for your health is sufficient for a claim for fear of cancer, but that the claims have to be genuine and serious.

Instruction A the defendant had originally submitted based on conversations with the Court last night and references to the MIA and case law relating to non-MAI instructions, defendant attempted to provide a narrowed down version of the *Ayres* instruction and also to finding what the claims for reasonable fear of developing cancer are, and we believe that the jury has to be given some type of guidance on this claim because the Supreme Court has made it clear that it's something beyond just a general concern for your health, but an actual emotional injury. Since federal common law governs the plaintiff's substantive claims we believe it's appropriate to instruction on that.

Finally, just with respect to that Rule 70.02 of the Missouri Supreme Court Rules it certainly allows for non-MAI instructions when there is no applicable MAI instruction, which in this case given the recency of the *Ayres* decision there would not be.

Similarly, as to Instruction Number C we believe it's appropriate based on a comparative fault theory to instruct the jury that the plaintiff has the same standard of causation as the defendant for purposes of plaintiff's negligence that i.e, that his negligence would have resulted in whole or part in injury to the plaintiff.

We cited New Jersey case law 3rd Circuit case law on this point, which would support that since the jury essentially, is assessing percentages between the two that it would be confusing for them to look at two different standards to do that.

Finally, exhibits or Instructions D and E relate to plaintiff's failure to mitigate damages, and given that plaintiff will be seeking damages for fear of cancer and potential future pecuniary damages the fact that plaintiff continued to smoke after his diagnosis would indicate fair to mitigating.

And finally, just with respect to the withdrawal of the loss of wages and benefits that plaintiff has never

## APPENDIX L

## UNITED STATES CODE ANNOTATED
## TITLE 45. RAILROADS
## CHAPTER 2--LIABILITY FOR INJURIES TO EMPLOYEES

### 45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or Other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign

commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Current through P.L. 110-16 approved 03-28-07

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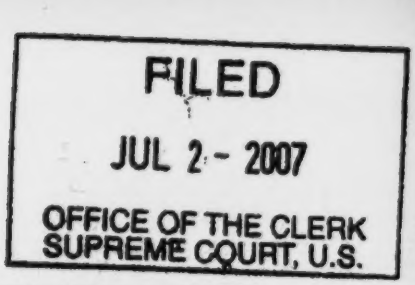


(2)

No. 06-1444

IN THE

# Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
*Petitioner,*

v.

TIMOTHY P. HEDGECORTH,
*Respondent.*

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals

## RESPONDENT'S BRIEF IN OPPOSITION

Maurice B. Graham
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Patrick J. Hagerty
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701 Market Street, Suite 800
St. Louis, MO 63101
314 241-5620

Counsel for Respondent
Timothy P. Hedgecorth

July 2007

## QUESTION PRESENTED

Whether the state court of appeals erred in affirming a trial court's application of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), that is consistent with this Court's precedent and does not conflict with any other state or federal courts.

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## STATEMENT OF THE CASE

Timothy Hedgecorth, respondent, worked for petitioner Union Pacific (and its predecessor Missouri Pacific) throughout the 1970s and 1980s in an old building owned by the railroads. Pet. App. 6a. Throughout this time, Union Pacific carried out extensive remodeling of the building, which included wholesale removal of asbestos-containing material ("ACM"). *Id.* at 7a. Surveys of the building reflected ACM in poor condition that was easily disturbed, and much of the removal projects took place in and around Mr. Hedgecorth's work station. *Id.* at 6a-7a. The ACM pervaded the air handling system, causing it to be pulled down the pipe chases and then spread throughout the building. *Id.* at 8a.

After working in this environment over three decades, Mr. Hedgecorth was diagnosed with asbestosis, based on specific scarring in the lungs, an appropriate exposure history, and a latency period of over twenty years. *Id.* at 9a. After this diagnosis, Mr. Hedgecorth filed a lawsuit against Union Pacific under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, for damages due to personal injuries suffered from his exposure to asbestos. Pet. App. 5a. In his petition, Mr. Hedgecorth requested both general damages and damages for pain and suffering.

At trial, plaintiff's pulmonary specialist described the risks associated with asbestosis, including a significantly enhanced risk of cancer. Pet. App. 9a. Substantial evidence was adduced about Mr. Hedgecorth's reaction to the mention of the cancer by the pulmonologist, his fear of developing an asbestos-related cancer, and his reaction when he did suffer a non-asbestos related cancer. Pet. 5. He testified that he worries about a recurrence of his cancer in light of his incurable asbestosis. *Id.* When he was told by Dr. Ohar of his asbestosis

and the associated increased risk of cancer it "knocked him off his feet." Pet. 5.

The case was tried after *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), in which the Court held that damages for fear of cancer may be recovered as part of an asbestosis victim's pain and suffering. Despite this holding, Union Pacific sought to have the jury instructed that Mr. Hedgecorth could *not* recover such damages unless the jury determined that such fear was an "actual injury." Pet. App. 81a-83a. And though *Ayers*, 538 U.S. at 149, stated plainly that a "plaintiff suffering bodily harm need not allege physical manifestations of her mental anguish," Union Pacific moved to instruct the jury that it *should* consider physical manifestations of the fear and at least ten (10) other particular actions – none of which find support in *Ayers* – in deciding whether to award damages for the fear of cancer due to Mr. Hedgecorth's medical diagnosis of asbestosis. Pet. App. 81a-83a.

The trial court properly refused these instructions, *id.* at 85a. Instead, the Missouri Approved Instruction ("MAI") damage instruction for FELA cases, MAI 8.02, was given. The jury determined that Union Pacific was eighty percent liable to Mr. Hedgecorth and awarded damages accordingly. Pet. App. 77a. The damages verdict was general, as neither party requested particularized verdict forms. The Missouri Court of Appeals affirmed, after applying FELA and Missouri state law. The court concluded that "*Ayers* does not require not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer." *Id.* at 19a. The court below recognized that *Ayers* allowed fear of cancer damages in an asbestosis case, and that nothing in *Ayers* supported departure from the longstanding maxim that FELA cases tried in state court are governed by state procedural rules. *Id.* at 17a-19a.

## REASONS FOR DENYING THE WRIT

The Missouri Court of Appeals opinion in this case is entirely consistent with this Court's FELA jurisprudence. There is no disagreement among the state and federal appellate courts as to the scope of *Ayers*, nor any other reason why a Writ of Certiorari is appropriate in this case. No court has given credence to Union Pacific's novel reading of this Court's *Ayers* decision, which was expressly limited in its holding, as a mandate to all courts to use a particular jury instruction. Even if its reading were credible, the jury instructions requested by Union Pacific in this case contradicted *Ayers*, making this an inappropriate case for review.

### A. The Court Below Faithfully Applied *Ayers* and Its Decision is Consistent with Other Courts' Application of FELA.

The Court's holding in *Ayers* did not pertain to jury instructions, but rather to an element of substantive law under FELA. Simply put, the Court examined whether a railroad worker suffering from the compensable disease of asbestosis could recover damages, as part of his "pain and suffering," for his fear of developing cancer. *Ayers*, 538 U.S. at 140. The Court answered in the affirmative, adding that: "It is incumbent upon such complainant, however, to prove that his alleged fear is genuine and serious." *Id.* at 157.

The Court did not hold that a jury must be instructed using the terms "genuine and serious." In fact, the trial court in *Ayers*, which this Court affirmed, did not use either word in its brief jury instruction on fear of cancer damages. The decision in *Ayers* was expressly limited to the substantive issue of whether fear of cancer damages could be recovered by a

plaintiff with asbestosis. The Court stated: "We rule, *specifically and only*, on the question whether this case should be aligned with those in which fear of future injury stems from a current injury, or with those presenting a stand-alone claim for negligent infliction of emotional distress. We hold that the former categorization is the proper one under the FELA." *Id.* at 159 (*emphasis added*).

The Court's only reference to jury instructions was in a footnote addressing concerns raised by the dissent. *Id.* at 158 n.19. The *Ayers* trial involved six separate plaintiffs, and this Court described how in such a case verdict control measures such as particularized verdict forms, jury instructions and motions directed to the sufficiency of the evidence were available to the defendant. *Id.* None of these were at issue in *Ayers*. Of course, the Court's non-exhaustive list of verdict control measures would also include those filed by Union Pacific in this case, e.g., challenge to submissibility of the case, motion for judgment notwithstanding the verdict, Pet. App. 11a, motion for new trial and motion for remittitur. Pet. App. 23a.

Here, the Missouri Court of Appeals recognized the limited holding of *Ayers* when it stated: "[A]lthough the state trial court in *Ayers* had instructed the jury on damages for fear of developing cancer, the Court in *Ayers* did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law. Since the form of instructions is a matter of Missouri law, the *Ayers* holding does not require a change to the form of approved MAI instructions." Pet. App. 19a.

The Court in *Ayers* did not state and could not have intended that a "genuine and serious" instruction must be given in all courts in the state and federal systems, which have their own unique methods of instructing juries. This would effect a

sea change in the way courts consider FELA claims, and no case cited by Union Pacific or found by respondent has suggested *Ayers* requires this practice.

While *Ayers* was not a case about FELA jury instructions, as Union Pacific contends, the cases cited by the Court in support of its holding, 538 U.S. at 150, support denial of the petition before the Court. For example, in *Wolff v. A-One Oil, Inc.*, 627 N.Y.S.2d 788, 789 (N.Y. 1995), the court stated that "under prevailing law, in order to maintain a cause of action for 'fear of [developing] cancer' following exposure to a toxic substance like asbestos, a plaintiff must establish both that he was in fact exposed to the disease-causing agent and that there is a 'rational basis' for his fear of contracting the disease." The court went on to find that such a "rational basis" could be supplied by "some indication of asbestos-induced disease." *Id.* The substantial evidence presented by Mr. Hedgecorth easily satisfies such a standard.

In *Coffman v. Keene Corp.*, 608 A.2d 416, 424 (N.J. Super. 1992), also cited in *Ayers*, the court upheld an award for fear of cancer damages based on testimony that the plaintiff's asbestosis was progressive and untreatable and that his lungs were permanently scarred. Plaintiff testified to his fright at hearing the diagnosis, and that his fright was magnified by the fact that his brother-in-law had physically wasted and died from asbestosis-related cancer. *Id.* This is akin to Mr. Hedgecorth, who having suffered through a non-asbestosis cancer knows first-hand how devastating and frightening cancer can be.

Like the Missouri Court of Appeals here, federal and state courts have applied *Ayers* consistently. For plaintiffs like Mr. Hedgecorth who suffer asbestosis and a reasonable fear of cancer, damages are allowed. *See, e.g., Enigwe v. United*

*States*, 2006 WL 2349992 (N.D. Ohio) (plaintiffs entitled to fear of cancer damages "inasmuch as they were suffering from the actionable injury asbestosis caused by work-related exposure to asbestos," and such damages could be obtained "without proof of *physical manifestations* of the claimed emotional distress, . . . .") (*emphasis added*); *Jones v. CSX Transp.*, 337 F.3d 1316, 1317 (11th Cir. 2003) (objective manifestations of emotional distress not required under *Ayers*). For plaintiffs without the conditions suffered by Mr. Hedgecorth, fear of cancer damages have been disallowed. *See, e.g., Campbell v. CSX Transp.*, 892 So.2d 923, 927-28 (Ala. Cir. App. 2004) (summary judgment against FELA plaintiff who could not show a genuine and serious fear of cancer because no physician ever told him he had an increased risk of cancer); *Stewart v. CSX Transp.*, 602 S.E.2d 665, 666 (Ga. App. 2004) (no error in trial court's excluding fear of cancer damages because jury found plaintiff did not have asbestosis); *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, 806 N.E.2d 537, 540 (Ohio 2004) (emotional distress damages not allowed under *Ayers* without a physical injury or proof of presence in "zone of danger").

In short, courts are faithfully following the *Ayers* admonition that its holding is *specifically and only* directed to the substantive elements of fear of cancer damages in a physical injury case. *Ayers*, 538 U.S. at 158. There is no conflict this Court must resolve, nor even the slightest disagreement as to the holding in *Ayers*.

### B. Union Pacific's Proposed Instructions Were Not Appropriate under *Ayers*.

Even if the Court found Union Pacific's novel request for a "genuine and serious" jury instruction to be credible, this is not an appropriate case to consider that question since the result in this case would have been no different. And, far from following *Ayers*, Union Pacific's instructions contradicted this Court's opinion.

The trial court in *Ayers* had instructed the jury that: "[A]ny plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering." *Ayers*, 538 U.S. at 143. The trial court rejected the railroad's proposed instruction which would have disallowed fear of cancer damages unless the claimant proved both "an actual likelihood of developing cancer" and "physical manifestations" of the fear. *Id.* The Court affirmed the rejection of this instruction. *Id.* at 158-59.

Yet here, Union Pacific urged the trial court to give an instruction much like the railroad's *rejected* instruction in *Ayers*. First, rejected Instruction A would have required the jury to determine on its own whether fear of cancer is an "actual injury." Pet. App. 81a. However, the Court had already decided this in *Ayers*: "Accordingly, we hold that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos." 538 U.S. at 141.

As this Court stated: "Heightened vulnerability to cancer . . . 'must necessarily have a most depressing effect upon the injured person. Like the Sword of Damocles,' he knows it is there, but not whether or when it will fall." *Id.* at 150 (quoting *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 331, 74 S.E. 885, 886 (1912)). With this clear recitation of FELA law on fear of cancer damages, the Missouri court would have no reason to submit to a jury whether the fear is an "actual injury."

Rejected Instruction A also would have asked the jury to consider whether plaintiff suffered physical symptoms of the fear, when *Ayers* made clear that these were unimportant to a fear of cancer already deriving from the medical diagnosis of asbestosis. 538 U.S. at 149.

The only other instruction on fear of cancer offered by Union Pacific also was not authorized by *Ayers*. Rejected Instruction B, like Instruction A, asked the jury to debate what *Ayers* had already decided: whether fear of cancer is an emotional injury to an asbestosis victim. Again, this instruction referenced physical symptoms in violation of *Ayers*. Pet. App. 83a. Neither rejected Instruction A nor B is supported by the substantive holding in *Ayers*.

Finally, there is no reason to believe that the outcome of this case would have been different had Union Pacific submitted an instruction at least arguably consistent with *Ayers*, and the trial court given it. The jury was instructed that Mr. Hedgecorth bore the burden of proof to establish his damages, MAI 3.01, and that any future damages awarded must be "reasonably certain" to occur. MAI 8.02. Damages presently sustained or reasonably certain to ensue, such as those due to Mr. Hedgecorth's demonstrated fear of cancer, can hardly be considered less than "genuine."

### C. Denying This Writ Would Be Consistent With This Court's Precedent Favoring State Jury Verdicts Issued In Accordance with FELA and State Procedural Law.

FELA cases tried in state courts are governed by state procedural rules, and the form of instructions in such cases is "a procedural matter governed by the law of Missouri." *Meredith v. Missouri Pacific R.R. Co.*, 467 S.W.2d 79, 82 (Mo. 1971). Instructions approved by the Missouri Supreme Court, where applicable, are "mandatory to the exclusion of all others." *Griffith v. St. Louis San Francisco Railway Co.*, 559 S.W.2d 278, 290 (Mo. App. 1977). Naturally, approved Missouri instructions are not binding to the extent they misstate the applicable substantive law. *Clark v. Missouri & Northern Arkansas R.R. Co.*, 157 S.W.3d 665, 671 (Mo. App. 2004).

The court below recognized that the approved FELA damage instruction, MAI 8.02, was applicable and did not misstate the substantive law. Pet. App. 18a. As to Union Pacific's claim that a separate instruction was needed on fear of cancer, the court applied the Missouri state-law principle to allow counsel to argue the appropriate elements of damage, including emotional distress damages, rather than instruct on particular subcategories of damages. *Id.* at 17a-18a.

Recently, this Court held in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. __, 127 S.Ct. 799 (2007) that Missouri jury instructions must utilize the same causation standard for both railroad negligence under Sec. 1 of the FELA and employee contributory negligence under Sec. 3. In so holding, the Court refrained from mandating a particular instruction, stating: "As a review of FELA model instructions indicates, n.2, *supra*, there are a variety of ways to instruct a jury to apply the

same causation standard to railroad negligence and employee contributory negligence. Missouri has the same flexibility as the other states in deciding how to do so, so long as it now joins them in applying a single standard." 127 S.Ct. at 801. Missouri has exercised that flexibility, while properly applying the single FELA standard here, just as other courts have done.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 06-1444

# In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
*Petitioner*,

v.

TIMOTHY P. HEDGECORTH,
*Respondent*.

**On Petition for a Writ of Certiorari to the Missouri Court of Appeals**

## PETITIONER'S REPLY BRIEF

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## RULE 29.6 STATEMENT

Union Pacific Railroad Company states that it is a wholly owned subsidiary of Union Pacific Corporation and Southern Pacific Rail Corporation. Southern Pacific Rail Corporation is a wholly owned subsidiary of Union Pacific Corporation. Dodge & Cox is the only publicly held company that owns ten percent or more of the stock of Union Pacific Corporation.

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The notion that state pattern jury instructions are immune from scrutiny by this Court is simply not true. As recently as this year and as early as twenty-two years ago, the Court held that the Missouri Approved Instructions did not properly advise the jury of the substantive law to be applied in cases brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.* ("FELA"). *See Norfolk & Southern Railway Co. v. Sorrell*, 549 U.S. ___, 127 S.Ct. 799 (2007); *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409, 411-12 (1985). The Missouri Supreme Court itself amended the very pattern instruction at issue because it failed to properly submit the substantive law, once in response to *Dickerson* (adding a provision regarding reduction of future damages to present value) and once in response to *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980)(adding a provision informing the jury that any damages it may award are not subject to income tax). *See* Notes on Use (1996 Revision) and Committee Comment (1996 Revision) to MAI 8.02, MISSOURI APPROVED JURY INSTRUCTIONS (6th ed. 2002) at 108-109.

This petition is not concerned with whether the FELA permits recovery for fear of cancer. Rather, the question here is whether state court pattern jury instructions must explicitly convey the requirements of the governing federal substantive law as declared in *Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135 (2003). Underlying the Court's conclusion on the substantive law was the principle that the jury must be properly instructed as to what the substantive law is. The petition presents the next logical question — whether federal law *requires*, "on a defendant's request, a charge that each plaintiff must prove any alleged fear of cancer to be genuine and serious." *Id.* at 159 n.19.

Petitioner Union Pacific Railroad Company sought jury instructions that would have directed the jury to make such findings as a predicate to an award of damages for fear of cancer, but the trial court refused them. None of the instructions actually given expressly addressed the substantive law applicable to a fear of cancer claim. The Court should grant review to decide whether the FELA mandates such an express instruction.

## I. INSTRUCTIONS IN A FELA CASE MUST REFLECT THE FEDERAL SUBSTANTIVE LAW INCLUDING *AYERS'* "GENUINE AND SERIOUS" REQUIREMENT

Respondent's principal argument — that *Ayers* "did not pertain to jury instructions," Resp. Br. 3-5 — misses the mark. One can only come to that conclusion by putting blinders on. *Ayers* held that a FELA plaintiff with an actionable injury may recover damages for fear of cancer, subject to the "important reservation" that he "prove that his alleged fear is genuine and serious." 538 U.S. at 157-58. The question here is whether federal law requires the jury to be told that they may award damages for fear of cancer only if they find as a fact that the alleged fear meets that standard.

The function of jury instructions is to tell the jury what facts the parties must prove. In response to concerns that there would be jury speculation as to the proper compensation for fear of cancer damages, *Ayers* emphasized that trial courts, "on a defendant's request" ought to "charge [the jury] that [the] plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. Respondent's suggestion that *Ayers* only requires such jury instructions when there are multiple plaintiffs, Resp. Br. at 4, is a misreading of the

opinion. Properly instructing the jury is vital regardless of the number of plaintiffs.

Respondent concedes, as he must, that parties in FELA cases are entitled to jury instructions that fully and accurately convey the requirements of the governing federal substantive law. Resp. Br. 9. *See, e.g., Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 491 (1916); *Dickerson*, 470 U.S. at 411-12; *Monessen Southwestern Railway Company v. Morgan*, 486 U.S. 330, 335, 342 (1988). Yet, nowhere does he explain why or how MAI 8.02 informed the jury of the federal substantive law that damages for fear of cancer should be awarded only if the jury found the fear to be "genuine and serious."

MAI 8.02, quite simply, does not do this. The instruction the trial court gave, based on MAI 8.02, did not inform the jury that fear of cancer, as a species of negligently inflicted emotional distress, was a distinct element of Respondent's alleged damages. *See* Pet. App. 80a. Nor did the instructions describe the "injury" at issue or inform the jury, consistent with *Ayers'* command, that a plaintiff is only entitled to fear of cancer damages if he or she proves his or her fear is "genuine and serious." *Id.* Contrary to *Ayers'* unmistakable language, the general instruction given allowed the jury to award fear of cancer damages for any expression of concern on Respondent's part, even if it believed his concerns were insignificant or uncorroborated by objective evidence.[1] *Id.*

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[1] Respondent does not dispute that an instruction conveying *Ayers'* "genuine and serious" requirement is particularly important in non-malignant cases, such as his, in light of the large and growing number of non-malignant claims entering the system. *See* Resp. Br.; Pet. 16.

Respondent's only argument that the trial court "properly refused" Union Pacific's instructions is to parrot the Missouri Court of Appeals opinion that *Ayers* "did not discuss or authorize jury instructions. . . . [and] [s]ince the form of instructions is a matter of Missouri law, the *Ayers* holding does not require a change in the form of approved MAI instructions." *Id.* at 2, 4 (citing Pet. App. 19a); Resp. Br. 2.

Of course, *Ayers did* discuss the use of jury instructions in "fear of cancer" cases. In response to the dissent's concern that allowing claims such as this will lead to unbridled speculation by juries and possible bankruptcy of target defendants, the Court expressly identified jury instructions — such as those requested here by Union Pacific — as a verdict control device to cabin awards to claims where the jury found the alleged fear to be both genuine and serious. 538 U.S. at 159 n.19.

Moreover, even though the precise wording of such an instruction was not the primary issue before the Court in *Ayers*, it is well-settled that jury instructions must reflect the federal substantive law with respect to damages. *Kelly*, 241 U.S. at 491; *Dickerson*, 470 U.S. at 411. State procedural rules with respect to the form of jury instructions do not impinge on this maxim. *See Dickerson*, 470 U.S. at 411-12.

Nor is Union Pacific's reading of *Ayers* "novel," as Respondent claims. Resp. Br. 3, 7. It is hardly a leap of faith to extend *Ayers'* establishment of the prerequisites for a fear of cancer claim in a FELA case to a requirement that the jury be instructed in accordance with the substantive elements of the law — namely, on its "genuine and serious" requirement. *See Kelly*, 241 U.S. at 491; *Dickerson*, 470 U.S. at 411. Kansas, for example, has incorporated the *Ayers* principle into its pattern instructions, entitling a defendant to

an instruction that a plaintiff must prove that any alleged fear was "genuine and serious." *See* KS-PIKCIV § 132.20.

Respondent's argument that that he presented sufficient evidence to recover damages for fear of cancer likewise misses the point. Resp. Br. 5-6. The courts below did not refuse the proffered instructions because there was sufficient evidence to support Respondent's claim or because there was no evidence to support Union Pacific's contention that Respondent's alleged fear of cancer was neither genuine nor serious. *See* Pet at 5. Even where a plaintiff makes a submissible case, the defendant is entitled to instructions that properly put the issues before the jury.

None of the post-*Ayers* decisions cited by Respondent address this specific issue, nor do they hold that a jury instruction concerning the measure of damages in a FELA case is proper, even though it did not submit the essential findings necessary under the federal substantive law to award damages for fear of cancer. The Court should grant the petition to decide whether federal law requires that a jury be instructed on the "genuine" and "serious" elements of a fear of cancer claim, even if a state's pattern instructions have no such constraint. Pet. App. 17a-18a; *Dickerson*, 470 U.S. at 411-12.

## II. THE INSTRUCTIONS TENDERED BY UNION PACIFIC WERE SUPPORTED BY THE EVIDENCE AND SUBSTANTIALLY FRAMED IN THE LANGAUGE OF *AYERS*

Respondent also claims that Union Pacific's instructions contradicted this Court's opinion in *Ayers*. The instructions tendered by Union Pacific were supported by the evidence and framed substantially in the language of *Ayers* and the

decisions of other courts which establish the circumstances under which a plaintiff may recover damages for a fear of cancer claim.

Respondent's contention that review is unnecessary because Union Pacific's instructions asked the jury to decide whether a "fear of cancer is an 'actual injury'" is not sustained by the record. Resp. Br. 7. The Court decided that legal issue in *Ayers*, subject to the important reservation that the claimant's fear must be "genuine and serious." *Ayers*, 538 U.S. at 141, 157-58. Rather, the proposed instructions required the jury to affirmatively find certain ultimate facts essential to a finding that Respondent had a "genuine and serious" fear of cancer, *i.e.*, an actual injury as defined by this Court. *Id.*; Pet. App. 81a-84a.

Furthermore, Respondent incorrectly claims that any physical symptoms of his alleged fear "were unimportant to a fear of cancer [claim] already deriving from the medical diagnosis of asbestosis[.]" Resp. Br. 8. A "genuine and serious" fear, according to *Ayers*, amounts to more than a "general concern for [one's] future health" and the fact finder may consider the absence of physical symptoms as evidence that the injury "'is less severe and therefore less deserving of a significant award.'" *Id.* at 157-58 & 158 n.17 (citing *Smith v. AC and S, Inc.*, 843 F.2d 854, 859 (5th Cir. 1988) in which a "'general concern for [one's] future health' [was] held insufficient to support recovery for an asbestosis sufferer's fear of cancer").

Evidence that an individual has more than a general concern for his or her health in addition to demonstrable physical symptoms has long been the benchmark for recovery of emotional distress damages. *See Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978); *Foreshee v. Waterloo Industries,*

*Inc.*, 178 F.3d 527, 531 (8th Cir. 1999); *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992).[2] The language used in the tendered instructions is taken from these decisions and tracks the requirements established by the caselaw. The omission of this language would allow any person who has been diagnosed with asbestosis to recover damages for fear of cancer regardless of whether he or she has any concern, much less a "genuine and serious" concern, that cancer may develop. This is not what the Court intended in *Ayers*. 538 U.S. at 157-58, 159 n.19.

Respondent's claim that the error, if any, was harmless also cannot be sustained. Resp. Br. 8. Jury instructions are supposed to provide meaningful guideposts that inform a jury of laypersons what the applicable law is. Instructions aren't supposed to be just a rote lecture on the law or a statement of abstract principles, but a practical tool to help juries reach important and often difficult decisions as to liability and damages. If the jury is not told the proper legal principles that should govern its decision, and the facts they need to find to render a verdict for either a plaintiff or a defendant, then how can we have any confidence that the jury resolved the case correctly?

Finally, simply because Union Pacific's counsel was left to making arguments about the factual issues related to the "genuine and serious" requirement in his closing does not foreclose this Court's review. Resp. Br. 9. Any experienced

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[2] We note that the Missouri Approved Instruction for such claims under state law require the jury to find that the "plaintiff sustained medically diagnosable and significant emotional distress." *See* MAI 31.23 [2000 New], MISSOURI APPROVED JURY INSTRUCTIONS at 494.

trial lawyer knows that a judge's instructions bear a stamp of legitimacy regarding the applicable law that lawyers cannot match (and, indeed, it would be error for them to contradict). Few instructional errors have greater significance in a trial than the court's refusal to instruct on a core element of the plaintiff's case. It is the court's responsibility to see that the jury receives the proper guidance on the law for its deliberations. Whether the jury received correct guidance is the essence of the petition.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, this Court may wish to consider summarily reversing the decision below.

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